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Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 124

HOTEL & RESTAURANT EMPLOYEE'S INTERNATIONAL ALLIANCE, LOCAL No. 122, ET AL., PETITIONERS.

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

PETITION FOR CERTIORARI FILED JUNE 3, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

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STATE OF WISCONSIN

IN SUPREME COURT

August Term, 1940. No. .....

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL NO. 122; PHIL L. VALLEY, JOHN ALEXANDER, and JACK HEISDORF, each Individually, as Business Agent, Organizer, and Vice-President, Respectively, for, and as representatives of all the Members of Hotel and Restaurant Employees' International Alliance, Local No. 122;

INTERNATIONAL LAUNDRY WORKERS, LOCAL NO. 174;

BARTENDERS INTERNATIONAL LEAGUE OF AMERICA, LOCAL NO. 64, sometimes known as International Bartenders & Beverage Dispensers, Local No. 64;

INTERNATIONAL UNION OPERATING ENGINEERS, LOCAL NO. 311;

MILWAUKEE BUILDING TRADES COUNCIL,

All Affiliated with the American Federation of Labor,

Petitioners and Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD; HENRY C. FULDNER, individually and as Chairman of, L. E. GOODING, individually and as a member of, R. FLOYD GREEN, individually and as a member of the Wisconsin Employment Relations Board,

Respondents.

CASE.

This is an appeal from the judgment of the Circuit Court of Milwaukee County, Honorable Gustave G. Gehrz, presiding, entered on the 14th day of May, 1940, sustaining, confirming and en-

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forcing the final order of the Wisconsin Employment Relations Board, and the findings and conclusions of said Board dated February 15, 1940.

1 **Summons.**

2 **PETITION FOR REVIEW.**

(Venue and title omitted.)

The petitioners above named, by Padway, Goldberg & Tarrell, their attorneys, join collectively in this petition and respectfully pray that the Honorable Circuit Court in and for Milwaukee 3 County, Wisconsin, review the findings, orders and decision made by the Wisconsin Employment Relations Board in the proceeding before the Wisconsin Employment Relations Board, entitled "Plankinton House Company, a Wisconsin corporation, Complainant, v. Hotel & Restaurant Employees International Alliance, Local No. 122, et al., Respondents," being case No. 78 Cw-4, before the said Wisconsin Employment Relations Board, which findings, orders and decision were made and filed by the said Wisconsin Employment Relations Board on February 15, 1940.

Petitioners show to this Honorable Court that the grounds upon which review is sought are:

That said findings of fact are not supported by credible and competent evidence in the record;

That such findings are erroneous, contrary to fact, and contrary to law;

That the Wisconsin Employment Relations

Board made its findings and orders based on erroneous conclusions of law;

That the Wisconsin Employment Relations Act, known as Chapter 57 of the Laws of the State of Wisconsin 1939, is unconstitutional and void in whole and in part;

That the Wisconsin Employment Relations Board, as an administrative body, is unconstitutionally constituted and has no status in law or in fact;

That the orders appealed from are violations of constitutionally guaranteed rights of petitioners and the membership of said petitioning unions, and, therefore, unconstitutional and void;

That the Wisconsin Employment Relations Board had no jurisdiction over the subject matter hereof, and Chapter 57, Laws of 1939, repealing and recreating chapter 111 of the statutes, is unconstitutional and void if applicable to the parties herein, for the reason that the subject matter and the parties in the proceedings before the Wisconsin Employment Relations Board were and are subject to the jurisdiction of the National Labor Relations Board and the National Labor Relations Act, creating the National Labor Relations Board (U. S. Code, Title 29, Chapter 7, Paragraphs 151 through 166);

That the complaint of the complainant in the proceedings before the Wisconsin Employment Relations Board charged the respondent unions with no violation of law described or set forth in Chapter 57 of the Laws of 1939, did not and does

not state a cause of action with respect to such unions, and the Board was and is, therefore, without jurisdiction to issue the order herein;

The order was void and of no effect whatsoever, and the Board had no jurisdiction to issue the same in so far as it is applicable to and runs against individual striking employees of the Plankinton House Company, a Wisconsin corporation, for the reason that such employees were not specifically named in such complaint, and were not served with notice of the proceedings before the Board, and such order, therefore, destroys for such individual employees valuable contract, property, and natural rights guaranteed without due process of law, contrary to the provisions of Article I of the Constitution of the State of Wisconsin, and contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States;

That such order is in violation of the contract rights of the respondent unions and constituted an abrogation and denial of such contract rights, contrary to law, contrary to Article I of the Constitution of the United States, contrary to Article I of the Constitution of the State of Wisconsin, and contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States;

That the Wisconsin Employment Relations Board had no jurisdiction over the persons to and subject matter of this action and no authority to issue the order herein, and such order is, therefore, null and void for the reason that under the

terms and provisions of Chapter 57 of the Laws of 1939, under which the Wisconsin Employment Relations Board purportedly acted such Board is deprived of jurisdiction, and such act does not apply to relationships and permissive courses of conduct fixed by contract and law prior to the effective date of the aforesaid Chapter 57, Laws of 1939;

The order of the Board deprives the respondent unions, the officers, individual members thereof, and individual employees of the Plankinton House Company, a Wisconsin corporation, of freedom of speech and assemblage, guaranteed to and preserved for them by the Constitution of the State of Wisconsin and the Constitution of the United States of America, and is in violation of the Fourteenth Amendment to the Constitution of the United States, and in violation of Article I of the Constitution of the State of Wisconsin;

That the relief granted to the Plankinton House Company by the Wisconsin Employment Relations Board is contrary to principles of law and equity, and is not subject to enforcement by this court because it is contrary to the laws of the State of Wisconsin heretofore made and provided, and known as Sections 103.51 through 103.62 of the Wisconsin Statutes, 1937.

Wherefore, your petitioners pray that a hearing be had in accordance with law in such cases made and provided for; that the findings of said board be set aside; that the orders of said board be set aside; and that Chapter 57 of the Laws

of the State of Wisconsin, 1939, be declared unconstitutional and void, and for such other and further relief which shall be just and equitable in the premises.

6–10 Verifications.

11 Proof of service.

12 Cover.

13 **Admission of service to answer and cross-petition of Wisconsin Employment Relations Board.**

14 **ANSWER AND CROSS PETITION.**

(Venue and title omitted.)

Now comes the Wisconsin Employment Relations Board, one of the respondents in the above-entitled matter, by John E. Martin, Attorney-General; James Ward Rector, Deputy Attorney-General, and N. S. Boardman, Assistant Attorney-General, and for answer to the petition herein admits, denies and alleges as follows:

15 1. Admits the entry of the order complained of.

2. Denies that the order complained of is void or unlawful for any of the reasons set forth in said petition or for any other reason, and in this connection alleges that the order complained of is a valid and lawful order. Specifically denies that the employer's business is such as to subject him to the terms and provisions of the National Labor Relations Act or to the jurisdiction of the Na-

tional Labor Relations Board in any way, shape or manner.

Wherefore, this answering respondent prays that the petition be dismissed and that a judgment be entered affirming and enforcing the amended order complained of.

CROSS PETITION.

Further answering, and for a cross petition, the respondent, Wisconsin Employment Relations Board, pursuant to the authority conferred upon it by the provisions of Ch. 57, Laws of 1939, respectfully petitions the Court for the enforcement of the amended order complained of in the petition for review. In support of this petition the Board respectfully alleges and shows:

1. That the Wisconsin Employment Relations Board (hereinafter referred to as the Board) is and at all times mentioned herein was an administrative body, created by Ch. 57, Laws of 1939, and that Henry C. Fuldner is the chairman and L. E. Gooding and R. Floyd Green are commissioners or members of said Board.

2. That the Plankinton House Company (hereinafter referred to as the Company) is a corporation duly organized under the laws of the State of Wisconsin, having its principal office at 609 North Plankinton avenue, Milwaukee, Wisconsin, and that said Company operates the Plankinton House and the Kilbourn Hotel, both located in the City of Milwaukee, Wisconsin, together with three automobile parking lots in said city.

3. That the Hotel and Restaurant Employees International Alliance, Local 122, Bartenders International League of America, Local No. 64, International Laundry Workers, Local No. 174, and International Union Operating Engineers Local No. 311, are voluntary incorporated associations, each of which is affiliated with the American Federation of Labor.

4. That the Milwaukee Building Trades Council is a central labor organization composed of various labor unions in the City of Milwaukee, Wisconsin, having as members persons employed in the building trades, all of which labor unions are affiliated with the American Federation of Labor; that the organizations referred to in this and the preceding paragraph will hereinafter be referred to as "the Unions."

5. That the independent organization of the Plankinton House employees is an unaffiliated labor organization, admitting to membership all employees of the Company, except officers, directors, executives and supervisors, and was organized on the 21st day of November, 1939.

6. That on or about the 20th day of November, 1939, the Company filed complaint with the Board charging the Unions, the officers and agents thereof and the members thereof with unfair labor practices, to wit, violation of Sec. 111.06 (2) (a), (e), (f), (g), (h) and (j) and Sec. 111.04 of the Employment Peace Act.

17 7. That the Unions, their officers and agents, answered in substance, denying such unfair labor

practices and raising certain constitutional issues with respect to the validity of Ch. 57, Laws of 1939 (The Employment Peace Act).

8. That after due notice of hearing, a hearing was held before the Board on December 1st, 11th, 12th, 13th and 14th, 1939.

9. That on the first day of said hearing, the independent organization of the Plankinton House employees, Milwaukee, Wisconsin, appeared by its attorney, George Burns, and requested leave to intervene in said matter and also file a petition with the Board, alleging that a question of representation existed with respect to the employer Company and further alleging that this organization as an independent unaffiliated organization nonemployer sponsored represented a majority of the employees in the unit appropriate for collective bargaining and that said organization was entitled to and should be certified as the sole representative of the employees of the Company for purposes of collective bargaining. The Board permitted such intervention and the filing of said petition and ordered that testimony be taken with reference thereto at the said hearing then in progress in relation to the alleged unfair labor practices.

10. That on the 15th day of February, 1940, the Board made and filed its findings of fact, conclusions of law and order with reference to said matters (charges of unfair labor practices), a true and correct copy of which is attached hereto, marked "Exhibit A" and made a part hereof; that said

order and findings were amended to cover inadvertent errors, a true and correct copy of which said amended findings and order is attached hereto, marked "Exhibit B" and made a part hereof.

11. That copies of said findings, conclusions and orders of the Board were duly served on the Unions, the officers and agents thereof; that said amended order, since its issuance and service, has been in full force and effect; that the Unions and the officers and agents thereof have not notified the Board in writing within the time required in said order what steps have been taken to comply with said order, but on the contrary have petitioned this court for a review of said order in which petition the said Unions seek to set aside said order; that the Board is informed and believes that the Unions and the officers and agents thereof have taken no steps to comply with the terms of said order and have not ceased and desisted from the unfair labor practices which the order required them to cease and desist from.

12. That the Board has caused to be certified and filed with this court a complete record in the proceedings, including all documents and papers on file in the said matter, the pleadings and testimony upon which said order was entered, and the findings and order of the Board to which record reference is hereby made and the said record incorporated herein.

Wherefore the Board prays that the court enter an order confirming and enforcing all provisions

of the order as amended herein referred to, that
19 the petitioners' complaint be dismissed and for such other relief as the facts and circumstances may warrant.

20-32 **Exhibit A attached to petition and cross complaint being copy of findings of fact, conclusions of law, and order of Wisconsin Employment Relations Board is not set forth herein, being set forth in this case at pages 251-262** (Record 837-846).

33-34 **Answer to cross petition.**

35 **Verification of the above.**

36 **Cover.**

37-38 **Order permitting Plankinton House Company to appear in proceedings before Circuit Court.**

39- **Petition to appear, argue, and file briefs as**
42 **amicus curiae, and order granting same.**

43 **Cover.**

44 **Admission of service.**

45- **Notice of return to Circuit Court and motion for**
47 **immediate enforcement of Court's order.**

48-50 **Affidavit in support of the above.**

51 **Cover.**

52– **Notice of opposition to motion for immediate**
53 **enforcement.**

54–56 **Affidavits in support thereof.**

57 **Cover.**

58–89 **MEMORANDUM DECISION.**

(Venue and title omitted.)

These actions, instituted upon petitions for review, have been thoroughly presented on both facts and law on behalf of all immediate parties
59 named in the title and others to whom due leave was granted. Oral arguments were made on April 8th, and 9th, 1940. Able and comprehensive briefs were submitted between April 20th, and May 1st, 1940 containing exhaustive and most helpful reviews of pertinent federal and state authorities. To again cite these in this memorandum is deemed unnecessary.

The court also has before it findings and opinions recently filed in this circuit in the following cases dealing with the subject and issues here considered:

No. 167-639, Wisconsin Employment Relations Board vs. Allen-Bradley Local No. 1111 (a similar review proceeding);

No. 169-311, Ward Whitney et al. vs. Local No. 122 of the Hotel & Restaurant Employees' etc. Alliance et al. (Plaintiffs are a few of the employees affected by the instant proceedings, who were denied separate equitable relief);

No. 170-287, New Hostess Ice Cream Company, vs. Milwaukee Building & Construction Trades Council. (An equity case involving simple advertising or publicity and the application of the clean hands doctrine.)

The matter first referred to (No. 167-639), like the actions at bar, was a proceeding for the review and enforcement of findings and an order of the Wisconsin Employment Relations Board, the members of which are respondents here. The constitutionality of the present "Employment Peace Act" of this State (Chap. 57, Laws of 1939; Chap. 111, Stats. of 1939) was there attacked upon several grounds again urged now. Since the Act in question is not a purely local one affecting only this county or circuit, the determination made in said action No. 167-639 by Hon. Otto H. Breidenbach, although the presiding judge of a co-ordinate branch of this court, need not be deemed binding or conclusive here. However, no conflict between the two branches of the court will result because the writer, after careful consideration, agrees with the conclusion of said branch No. 1 sustaining the validity of said "Employment Peace Act."

The action second referred to (No. 169-311) was brought in equity by only five employes at the Plankinton House, the larger hotel operated by the Plankinton House Company, one of the employers who had previously filed its own complaint herein with the Wisconsin Employment Relations Board charging the unfair labor prac-

tices now brought here for review. Said employer Company was not a party in said employes' suit. The attack upon the constitutionality of the "Employment Peace Act" now made was sought to be sustained in that suit but was expressly reserved for determination in the instant review proceeding with all, and not only a small number, of the parties vitally affected before the court and accorded their just and adequate opportunity to be heard.

It must be noted at the outset that the cases at bar are not concluded by, but are separate and distinct from, said equity suit (No. 169-311) for reasons there made to appear in the court's writ-
61 ten opinion filed February 15th, 1940 (pp. 9 to 12), and because the controversy now comes before the court, sitting as an appellate tribunal, for the review of the findings, conclusions and order of the Board as a special administrative tribunal charged by statute with the duty of hearing and determining such industrial disputes (Century Bldg. Co. vs. Wis. Employment Relations Board [Wis.], 291 N. W. Rep. 305, at 308-309, decided April 9, 1940).

In this connection, it must be borne in mind that the denial of injunctive relief in that action upon stated equitable grounds obviously is not binding or conclusive in the actions at bar. The findings of the Board are by statute accorded a definite status; they must be deemed "conclusive" at this time "if supported by credible and competent evidence in the record." [Sec. 111.07 (7), Stats.] This limitation of the court's func-

tion excludes the exercise of its general equity powers by virtue of which suits originally presented are heard, tried and determined by it. Certain legal conclusions reached and announced in said employes' action are, however, pertinent and will be adhered to and followed in these proceedings.

The validity of the so-called "Catlin Act" (Chapter 25, Laws of 1939) has not been directly challenged in the instant litigation, albeit the definition of a "labor dispute" therein laid down [Sec. 103.62 (3), Stats.] is the same as that contained in Sub-sec. (8) of Sec. 111.02, Stats. So much of said "Catlin Act" as now comprises Section 103.535, Stats. would also seem to be
62 affected by the determination of the valid scope and meaning of the phrase "picket, or induce others to picket" there used.

The New Hostess Ice Cream Company case (No. 170-287, the third referred to) was dismissed because it involved trivial and inconsequential acts and called for application of the clean hands doctrine. The acts complained of consisted of truthful radio announcements or appeals (finding 15) and the display by single individuals called "sandwich-men" of canvas signs worn as aprons truthfully announcing on both the front and rear thereof that the plaintiff company was unfair to union labor. Primarily these signs were carried in the manner stated about the principal thoroughfares of the City of Milwaukee and only occasionally in the vicinity of the employer's location or of stores handling its products. The court's finding (No. 14) also states:

"All such patrolling and advertising was peaceful and without commotion or disorder of any kind. No threats of physical harm or economic loss and no molestation or harassment were made or indulged in. No show of numbers and no measures tending to coerce or intimidate anyone and no violence or breaches of the peace, or threats thereof, were made or indulged in. The free use of streets and entrances was not interfered with." [See: 103-53 (1) (e), Stats.]

The conduct described fell squarely within the definition of "fair persuasion" in Section 779 of the Restatement of the Law of Torts which is there stated to

"mean argument, exhortation or entreaty addressed to a person without

(a) threat of physical harm or economic loss, or

63 (b) molestation or harassment, or

(c) material and fraudulent misrepresentations."

The following "comment" lettered (i) (Page 111) is also deemed pertinent:

"On the other hand, general advertising away from a particular place directly or indirectly involved in the dispute, even though carried on by means of moving or stationary placarded men, is not picketing, though it may be fair persuasion if it complies with the standards stated in Subsection (1)."

All possible doubt with respect to the correctness of the foregoing views have been set at rest

by two decisions of the Supreme Court of the United States handed down on April 22nd, 1940. They are:

Thornhill vs. State of Alabama, 84 L. ed. 659;
Carlson vs. California, 84 L. ed. 668.

See, also:

Milwaukee E. R. & L. Co. vs. Pallange, 205 Wis. 126, 132, 134;
Schneider vs. State and Snyder vs. City of Milwaukee (Nov., 1939), 84 L. ed. 115, 117-118, 120-122;
Senn vs. Tile Layers Protective Union, 301 U. S. 468, 81 L. ed. 1229, at 1236.

In Wisconsin Labor R. Board vs. Fred Reuping L. Co. 228 Wis. 473, at P. 495, the defendant **employer** asserted that the board (the trier of fact) had assumed it to be improper for the employer to have any contact with his employees or engage in any conversation with them respecting union matters and

> "• • • claimed that this is contrary to the act, and, if not, that the act is unconstitutional as violating defendant's right of free speech."

The Supreme Court dealt with this contention by adopting as a standard, and quoting from, Texas & New Orleans R. Co. vs. Brotherhood
64 of Railway & Steamship Clerks, 281 U. S. 548, 568, 74 L. ed. 1034, in which the import and effect of the phrase "without interference, influence, or coercion" had been considered. The quotation

referred to these terms as "well-understood concepts of the law" and proceeded to demonstrate that reference as correct. Following that quotation, the writer of the opinion in the Rueping case, on P. 496, adds clarity to the ruling by means of the following statement which, if slightly paraphrased, fits the situation now before us:

> "There is little to add to the foregoing analysis. The right of free speech has never been considered to make impossible civil remedies or criminal prosecution for libel, duress, or fraud, although speech was the agency in each case. The distinction between the exercise by an employer of his right of freedom of speech and the actual use of the spoken word **as an instrumentality to overpower the will of employees is well understood, and constitutes the dividing line between what an employer may do and what he may not do.** It may, of course, be difficult to determine in a particular case on which side of the line the activities of a particular employer fall, **but this must be left to the trier of fact if there is room for conflicting inferences.** We have reviewed carefully the evidence which was **before the board and conclude that there is evidence to support the board's conclusion** that the conduct of defendant was deliberately devised and calculated **to override the will of its employees;** that the company authorized its foreman to conduct activities in favor of the company union and against outside unions; and that the defendant, through its officers and agents, intentionally created the impression that membership in an outside union might

result in discharge or in a shutdown of the plant. No useful purpose would be served by extending this opinion to include an analysis of the evidence in detail, and we merely indicate our conclusions **as to what the evidence** tends to prove."

65 "Peaceful picketing or patrolling" whenever accorded legal sanction (Subd. (1) of Sec. 103.53 (1) Stats.; Annotation 124 A. L. R. 751; Lauf vs. E. G. Shinner & Co., 303 U. S. 323, 82 L. ed. 872, 877; Senn vs. Tile Layers Prot. Union, 301 U. S. 468, 81 L. ed. 1229, 1236; Am. Furn. Co. vs. General Local Union, etc., 222 Wis. 338, 366-371), has invariably been conditioned upon the absence of intimidation or coercion, or any method involving fraud, violence, breach of the peace, threat thereof, or interference with the free use of streets and entrances. Here again, as in the case of controversies respecting "fair persuasion," the trier of fact has the advantage of observing the witnesses and their bearing, demeanor and credibility. He may justly deem credible what a reviewing tribunal is without power to cast out as incredible. This subject was dealt with in Century Building Co. vs. Wis. Employment Relations Board (Wis.), 291 N. W. 305, Par. 6, 7, on page 308 in a manner deemed ample for all present purposes. Much help can also be had from Comment h (P. 110) on Sec. 779, Restatement of the Law of Torts which reads:

"Whether the picketing is conducted in accordance with the standards stated in Subsection (1) **is a question of fact in each**

case. The number of pickets is a factor in ascertaining this fact; but there is no rule fixing the number of pickets at a definite figure. The question is in each case whether the number of pickets plus the attendant circumstances are such that fear of physical harm rather than persuasion is the force loosed upon the persons sought to be influenced. Thus it is important to consider the kind of place picketed and the character of persons sought to be influenced, that is,
66 for example, whether the place picketed is a foundry approached only by men or a department store patronized chiefly by women. It is important also to consider the character of the pickets, whether they are, for example, shy women or rough men. And it is important to consider the conduct of the pickets: whether they behave in a quiet, orderly manner or are boisterous and equipped with weapons of physical harm; whether they obstruct access to the place picketed so as to make ingress or egress difficult or do not interfere with it at all. Other factors may also be important, as, for example, **the presence or absence of private guards or public police** and the extent of protection afforded by them. In some circumstances, then, picketing may be a form of peaceful persuasion though the number of pickets is large; in others, the picketing may not be pair persuasion though the number is small."

Each case must turn on its own circumstances. In the cases at bar, the Board was justified in concluding that the violent methods, assaults or disturbances which were pursued or which ensued from the outset and from time to time there-

after were ample to characterize the whole campaign or to warrant a reasonable inference that the attitude of the picketers was continuously threatening, or that threatening conduct would be resorted to should conditions be favorable for the purpose. In this connection, constant presence of officers of the law and the nature of conduct employed were sufficient to warrant the Board's findings and conclusions (Am. Steel Foundries vs. Tri-City C. T. Council 66 L. ed. 189; 196-199).

The respondent Board after finding that on November 2nd, 1939, in the afternoon, the employes of the Plankinton House Company at both the Plankinton House and the Kilbourn Hotel,
67 went on strike and that prior to calling such strike they did not vote by secret ballot to call a strike, and that immediately thereafter picketing was engaged in at the three entrances to the Plankinton House, also made the following findings of fact, which the writer is convinced are supported by credible and competent evidence in the record, namely:

> "17. Phil L. Valley is business manager of Hotel and Restaurant Employees International Alliance, Local No. 122, and as such business manager, notified Marquette University and the Milwaukee School of Engineering, directing that all students working at the Plankinton House for their meals be ordered to immediately discontinue such work, and that unless such students did discontinue work at the Plankinton House, that the union would be forced to stop the employment of university students working at

other hotels and restaurants in the City of Milwaukee which had collective bargaining contracts with Local No. 122.

"18. That ever since the strike, the Plankinton House and the Kilbourn Hotel have continued to operate with the new employes replacing the striking employes.

"19. On November 4, 1939, union pickets, by means of force, prevented delivery to the Plankinton House of floral decorations by one Joseph Mueller, an employe of August F. Kellner Company. That as a result of the altercation at said time, Jack Heisdorf, Vice-President of Local No. 122, Hotel and Restaurant Employees International Alliance, and Charles McLaughlin, assistant to the secretary of Local No. 122, were arrested, and on November 17, 1939, convicted of assault and battery, McLaughlin being fined ten dollars and costs, and Heisdorf being fined five dollars and costs, the sentence against Heisdorf being suspended and he was placed on probation for thirty days. That Local No. 122 provided counsel and bail for both Heisdorf and McLaughlin, and paid McLaughlin's fine.

68 "20. Charles McLaughlin returned to the picket line immediately after his arrest, and on November 17, 1939, assaulted one Lester Raasch an employe of the Plankinton House, was again arrested, convicted and fined twenty-five dollars and costs, and the union again provided him with counsel and paid such fine.

"21. On November 4, 1939, two salesmen representing the Automotive Electrical Association, who were attempting to deliver dis-

plays and samples to the Plankinton House, were, my means of force, prohibited from making the delivery by Phil L. Valley and a number of pickets.

"22. On November 10, 1939, Jack Heisdorf, Charles Alden, striking employe of the Plankinton House, and other pickets, by the use of force prevented delivery of ice cubes to the Plankinton House, and in the course of the attempted delivery, Charles Alden assaulted Robert Jeske, then an employe of the Plankinton House.

"23. On November 17, 1939, Paul Ziebell, an employe of the Plankinton House, was assaulted by James O'Brien, a picket employed by the union, and stationed on the picket line at the Plankinton House. O'Brien was arrested, convicted and fined five dollars and costs.

"24. On November 14, 1939, Edward Knopf, an employe of the Plankinton House, was assaulted by John Thomas O'Maher, a picket stationed by the union at the Plankinton House, and a striking employe of the Plankinton House.

"25. On November 17, 1939, Rudolph Stano, an employe of the Plankinton House, was assaulted by Joseph Hofich, a picket stationed at the Plankinton House by the union, and Hofich was arrested, convicted, and fined five dollars and costs.

"26. On November 17, 1939, Thomas James, an employe of the Plankinton House, was assaulted by Larry McAllen, a picket stationed at the Hotel by the union, and fined five dollars and costs. (After due conviction.)

"27. Throughout the strike, the City of

Milwaukee caused to be stationed at the Plankinton House throughout the twenty-four hours of each day, six police officers for the purpose of maintaining order."

69 A full recital, with accurate references to the record, of almost daily conduct and occurrences extending from November 4th to November 18th, and thereafter to about November 27th, 1939, which must be considered ample to support the Board's conclusions as to a purpose to coerce, intimidate and injure, will be found on pages from 8 to 13 of the brief submitted by counsel for the Plankinton House Company. Repetition thereof at this time will not be necessary. The Captain of Police in charge of the force of men maintained on the ground, who has had much experience in maintaining peace and order, when pressed by counsel for the employees to minimize the acts of violence and disorder, very temperately answered: "I wouldn't say small, that depends on circumstances. It is a hard thing for me to answer that as to the amount——" (He was interrupted by counsel at this point: Rec. 448.)

The evidence also supports the Board's conclusion relative to the authorization and ratification of said acts (pp. 14-13 of the same brief). What was said by the court in the Whitney case upon the partial record then before it does not call for the setting aside of the Board's conclusions now before the court for review. The difference in its functions as the trial court on the one hand, with known judicial discretion, and as an appel-

late tribunal, on the other hand, dealing with findings of the Board given a definite status by law, has heretofore been explained.

In the Hotel Wisconsin controversy submitted upon the complaint of its owner, the Board made the following findings of fact:

"12. On November first, 1939, at 4:50 P. M., the employes of the Hotel Wisconsin went on strike. Prior to calling such strike, the employes of the Hotel Wisconsin did not vote by secret ballot to call it. Immediately after the strike, and continuing down to the time of the hearing before this Board, picketing was engaged in by members of all the respondent unions at the entrances to the Hotel Wisconsin.

"13. All of the employes of the Hotel Wisconsin, exclusive of executives and supervisory employes, went out on strike, and since that time the Hotel has continued to operate with new employes replacing the striking employes.

"14. During the course of the strike, the unions have persuaded guests of the Hotel Wisconsin to leave the Hotel, have persuaded prospective guests to refrain from patronizing the Hotel, and have persuaded groups to cancel engagements for luncheons and parties at the Hotel.

"15. Throughout the strike, the City of Milwaukee caused to be stationed at the Hotel Wisconsin throughout the twenty-four hours of each day, police officers for the purpose of maintaining order."

Supporting facts and circumstances disclosed

by the record are fairly set forth on pages from 6 to 8 of the brief submitted on behalf of The Milwaukee Hotel Wisconsin Company and will not be repeated.

The power and functions of the Board as a trier of fact in passing upon the evidence and all conflicting inferences to be drawn therefrom and the force and effect of the Board's findings when brought up for review under the National Labor Relations Act are also passed upon and thoroughly explained in National Labor R. Board
71 vs. Pennsylvania Greyhound Lines, 82 L. ed. 831, at 837; National Labor R. Board vs. Waterman Steamship Corp., 84 L. ed. 448, at 450; Wisconsin Labor R. Board vs. Fred Rueping L. Co., supra.

Termination of 1938 Contract.

The Board's first Conclusion of Law in each case is to the effect that the contractual relationship existing between the employers and the respondent unions was terminated by said unions on November 2nd. (1st.) 1939 by the refusal of said unions to accept the award of the board of arbitration and their acts of calling strikes at the hotels in question.

The actual intention of the parties with respect spect of this branch of the case appears convincingly from the facts set forth in the Board's findings, which in turn are adequately supported by the record. The briefs also cover the subject accurately. The citations of legal authorities are in point and fully support the conclusions. (Plank-

inton Brief, pp. 23 to 30; Hotel Wisconsin Brief, pp. 2 to 6; 11 to 17.)

It is unnecessary to hold that counsel for the principal unions actually submitted to arbitration matters relating to contract renewal affecting those organizations as to which no serious conflicts had arisen. Suffice it to say that each of the petitioners at all times was, and now is, vitally interested in the controversy of the other and that they all considered themselves parties to a common cause. All having the same employer, the attainment of their objectives required cooperation and that each would assist the others.

72 The 1938 contract contained only one arbitration clause designated as Article III. It was entered into by the parties with the aid of counsel. It should be liberally construed to effectuate its beneficent purposes which in Wisconsin labor acts have been stressed as the "diminishment of the causes of labor disputes," "negotiation of terms and conditions of labor to result from voluntary agreement between employer and employee," the maintenance of "industrial peace" and "of fair, friendly and mutually satisfactory employment relations." This article included this sentence, "The arbitration award shall be final and binding upon both parties." To limit this provision as now sought would do violence to the letter and spirit of the same. In the arbitration award of October 30, 1939 there was incorporated the agreement that the arbitrators decided should be in effect from June 16, 1939 to June 15, 1940. All of the demands urged by counsel for the unions were incorporated therein, but there was

added a provision that a closed shop was to be effective only on the condition that the employees of the respective hotels by a vote by secret ballot conducted under the supervision of the Board voted in favor of a closed shop by a 75 per cent majority. This provision was in conformity to sub-division (c) of Sec. 111.06 (1) Stats. which by the following proviso sought to obviate an unfair labor practice by the employer:

> "* * * provided, that an employer shall not be prohibited from entering into an all-union agreement with the representatives of
73 his employes in a collective bargaining unit, where three-quarters or more of the employes in such collective bargaining unit shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the board."

The obvious purpose of this statute would be served by imputing its provisions to the contract whether written therein or not (Stone vs. Inter-State Exchange, 200 Wis. 585, 589; Baumann vs. West Allis, 187 Wis. 506, 525). In any event, the Board was justified in concluding that the arbitrators were right in clarifying the contract by a fair provision in harmony with the law. In a spirit of entire fairness, the inclusion of this proviso did not warrant the calling of a strike with its damaging concomitants described in the Board's findings. In weighing circumstances indicating attitude toward the law, the Board also had the right to give consideration to the following portion of Exhibit No. 7, the letter of July 11, 1939,

"We regret to note that the tenor of such revisions evinces an anti-labor attitude on the part of your respective clients, **and we can only say that in all probability this is a natural consequence of the recent anti-labor laws passed by the Wisconsin Legislature**"

as well as the concluding paragraphs of the same letter (written at a comparatively early stage of free negotiation) implying a plain threat to injure unless the writers' demands are met within three days, namely:

"We are also enclosing a proposed letter which we intend to send the convention committee of the National Letter Carriers' Association unless a contract is executed by Saturday, July 15, 1939.

74 "We hope that after due consideration your clients **will think better of their position,** and will enter into a contract with the unions, and not make necessary arbitration **or the sending of the letter to the convention committee of the Letter Carriers' Association.**"

(Emphasis that of the writer.)

This threat to injure becomes doubly plain when the following paragraphs of the "Sample copy of letter to be sent out July 15" to the Convention Committee of the National Association of Letter Carriers (part of exhibit 7) are read:

"We ask that you inform all your locals throughout the country to advise their delegates to **refrain from making reservations** at such hotels; also, **if they have made reservations, to cancel the same.** * * *"

"We know that your delegates **would not**

> **like to go through a picket line** or stay at a hotel that is strike bound, aside from **the fact that services will be crippled and curtailed.**"

It is manifest that a disinterested reader of the above quoted statements will readily agree with the Board that they evince a plain threat of combination and concert of action directed at the injury of the employer and to coerce submission.

It is the view of the writer that the calling of the strike in this case was utterly inconsistent with a continuance of genuine contract relations between an employer and his employees with due regard to the mutuality of interest that should in a sincere sense accompany that relation. It convincingly shows a termination or repudiation of the contract and any reciprocal duties thereunder. The same conclusion would have followed a lockout by the employer. The views expressed by our Supreme Court in David Adler & Sons Co. vs.
75 Maglio, 200 Wis. 153, relative to lockouts demonstrates the correctness of that view.

Notwithstanding the contract reservation to the respective parties of "the right to strike or lockout" in the event of failure to effect a meeting of the minds, the conclusion is irresistible from all that has been said that the petitioners are in no position to invoke section 111.16 Stats. which provides:

> "Existing Contracts Unaffected. Nothing in this chapter shall operate to abrogate, annul, or modify any valid agreement respecting employment relations existing on the effective date hereof."

Has the National Labor Relations Board Exclusive Jurisdiction?

The above question is no longer an open one in this state or in this court. It was fully considered and decided in Wisconsin Labor R. Board vs. Fred Rueping L. Co. 228 Wis. 473, at 478 et seq.

This court in Whitney vs. Local No. 122, etc. (Case No. 169-311; pages 14 to 16 of the opinion) held the Wisconsin Employment Relations Board had jurisdiction in the instant proceedings. The factual showing then before the court does not materially differ from that presented here, hence there is no occasion for any change or modification of the conclusion there announced upon this branch of the litigation. (National Labor Relations Board vs. Fainblatt, 83 L. ed. 1014 and the array of cases cited in the opinion in that case; see also annotations in: 83 Law Ed. pp. 692 to 699; 112 A. L. R. 959 to 960; 115 A. L. R. 314 to 315; 117 A. L. R. 414 to 415; 123 A. L. R. 612 to 618). Congress has not pre-empted the field. The federal Act has not superseded either the 1937 or 1939 Wisconsin Acts.

76 Since the filing of the opinion in the Whitney case, supra, the Supreme Court of the United States on February 26, 1940, handed down its decision in Amalgamated Utility Workers vs. Consolidated Edison Company of New York 84 L. ed. 493 holding (Syl. 4):

> "The National Labor Relations Board is a public agency created to enforce the provisions of the National Labor Relations Act, and

> "not a tribunal for the enforcement of private rights by means of administrative remedies."

and that the private party on whose complaint proceedings were originally instituted by the Board is without any standing to apply to the courts for adjudications of contempt in disobeying any decree enforcing the Board's order. The Board alone is authorized to take proceedings to enforce its orders. That decision when fully considered emphasizes a vital difference between the Federal Act and the Wisconsin "Employment Peace Act." The standing and rights of interested parties other than the Board are plainly recognized and defined in the Wisconsin Act.

We again point to the fact that the National Labor Relations Act and the corrective measures there provided define and relate only to unfair labor practices by **employers.** (Sec. 158, Chapter 7, Title 29, Supplement IV, Code of Laws of U. S.) The Wisconsin Act (Chapter 111, Stats. 1939) on the other hand, defines and deals with unfair labor practices on the part of both employers **and employees.** (Sections 111.06, 111.07.) Only charges against **employees** and their unions or representatives are involved in the cases at bar.

77 This subject is fully treated on pages from 51 to 76 of the brief submitted by the Attorney General and on pages from 44 to 49 of the brief of the Plankinton House Company. The arguments there presented are convincing and need not be reiterated here.

Constitutionality of the Wisconsin "Employment Peace Act."

Some of the grounds of attack upon the validity of the present "Employment Peace Act", (such as the claim of fatal indefiniteness of terms and of invasion of the rights of minorities by the majority vote of employes), suggest the propriety of the following comparison and reference to terms now characterized as so indefinite, in declarations of public policy in the former (1937) and the present (1939) Wisconsin Acts:

The 1937 Act was called the "Wisconsin Labor Relations Act" and created Chapter 111 of the statutes

> "* * * relating to the promotion of equality of bargaining power between employers and employes, the diminishment of the causes of labor disputes, the creation of a labor relations board for the state of Wisconsin * * *"

and stated (Sec. 111.01) that it was enacted in furtherance of the public policy as to collective bargaining declared in Section 103.51, Stats. which had been passed in 1931 as one of thirteen new sections of the statutes described in their title as

> "* * * relating to litigation growing out of labor disputes and limiting the jurisdiction of courts sitting in equity"

78 and embodying a declaration of public policy which in part reads as follows:

> "* * * Negotiation of terms and conditions

> of labor should result from voluntary agreement between employer and employee. * * * it is necessary that the individual worker have full freedom of **association, self-organization**, and the designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be **free from the interference, restraint or coercion** of employers of labor, or their agents, in the **designation of such representatives or in self-organization** or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

(Note terms now challenged as indefinite and that voting by employees, after the manner of stockholders in corporations or the members of various associations, would be required to make association, self-organization and concerted activities feasible.)

Doubtless acting by virtue of the power of the state of Wisconsin, based upon the police power, to subject labor relations to regulation (Wis. Labor R. Board vs. Fred Rueping L. Co., 228 Wis. 473, 479-482), the legislature of this State enacted its said 1937 Labor Relations Act and therein prescribed definitions of terms used, created a Labor Relations Board with stated powers, prescribed what shall comprise unfair labor practices "for an employer" and provided for the prevention of the same, and also made ample provision, among other things, for the designation or selection "**by the majority** of the **employes in a unit appropriate for such purposes**" of representatives

who "shall be the exclusive representatives of **all the employes in such unit** for the purposes of collective bargaining." This Act was upheld and its efficacy assured by the decision of our Supreme Court in the Rueping case, supra, as a valid companion measure to the National Labor Relations Act in no wise superseded by the latter (pp. 482-491 of opinion).

Again acting under the State's police power, the legislature of the State in its 1939 session, by the enactment of the present "Employment Peace Act" and, by Section 111.01, in part declared the public policy of the state as to employment relations and collective bargaining to be as follows:

> "(1) It recognizes that there are three major interests involved, namely: That of the **public**, the **employe** and the **employer.** These three interests are to a considerable extent interrelated. It is the policy of the state to protect and promote **each of these interests** with due regard to the situation and to the rights of the others.
>
> "(2) Industrial peace, regular and adequate income for the employe, and uninterrupted production of goods and services are promotive of all of these interests. They are largely dependent upon the maintenance of fair, friendly and mutually satisfactory employment relations and the **availability of suitable machinery for the peaceful adjustment of whatever controversies may arise.** * * *
>
> "It is also recognized that whatever may be the rights of disputants with respect to

each other * * * they should not be permitted, in the conduct of their controversy, to intrude directly into the primary rights of third parties to earn a livelihood, transact business and engage in the ordinary affairs of life by any lawful means and free from **molestation, interference, restraint or coercion.**

80 "(3) Negotiation of terms and conditions of work should result from voluntary agreement between employer and employe. For the purpose of such negotiation an employe has the right, if he desires, **to associate with others** in organizing and bargaining collectively through representatives of his own choosing, **without intimidation or coercion from any source.**

"(4) It is the policy of this state, in order to preserve and promote the interests of **the public, the employe, and the employer alike,** to establish standards of fair conduct in employment relations **and to provide a convenient, expeditious and impartial tribunal** by which these interests may have their respective rights and obligations **adjudicated.**

While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat."

Like its predecessor, the 1939 Act prescribes definitions of terms used, creates an Employment Relations Board with stated personnel and powers, prescribes what shall comprise unfair labor practices for employers and employes alike individually or in concert with others, and makes comprehensive and thorough provisions for the prevention of same. It also explicitly declares

the rights of employes of self-organization and their right to form, join or assist labor organizations to bargain collectively through representatives of their own choosing **"by a majority of the employes voting in a collective bargaining unit"** and various other matters.

It is obvious from these declarations and enactments extending through the last decade that
81 employes, employers and the public, impelled by a vivid appreciation of the exigencies and the social and economic damage incidental to the problem, acting through their chosen representatives, have earnestly sought, and have adopted just and effective measures to regulate and stabilize labor relations and the disputes and litigation growing out of the same, and to that end have established administrative tribunals vested with the power to conduct elections, mediate, arbitrate, hear and determine controversies concerning unfair labor practices, and, finally, to make conclusive findings and orders subject only to limited judicial review. Some of the limitations upon the power of the courts have already been discussed. The following sub-sections of Sec. 111.07, Stats. prescribe others:

> "(9). In any proceedings for review of an order of the board the court shall disregard any irregularity or error unless it be made to appear affirmatively that the complaining party was prejudiced thereby." * * *
>
> "(12). A substantial compliance with the procedure of this chapter shall be sufficient to give effect to the orders of the board, and

they shall not be declared inoperative, illegal, or void for any omission of a technical nature in respect thereto."

In commendable harmony with the aims and spirit of the **three major** interests (aptly denominated such by the legislature), counsel for the petitioners (pp. 175 and 162 of their brief) make the following statements and concessions:

"(a) At the outset, the unions desire the court to know that they did not condone nor desire violence and disorders; that the position of the union is that labor controversies do not require violence, but that on the contrary, labor's cause is injured by violence." * * *

"(b) In this community it is well recognized that the labor movement is counseled and headed by responsible labor leaders. They have preached and encouraged peaceful picketing in the firm belief that the decent
82 and fair element of the community, which is by far the type of citizenry in this locality, will sympathize and respect labor's cause most if it is conducted peacefully and without violence." * * *.

"(c) We can readily think of other laws, provisions or orders of the court which might be deemed regulatory rather than prohibitory. A law or an order limiting the number of pickets within certain areas might be regulatory rather than prohibitory. Likewise, a provision similar to that found in Section 111.06 (2) (f) for the purpose of prohibiting blocking of entrances or free and uninterrupted use of public roads would be regulatory rather than prohibitory."

The exercise of the rights of free speech and liberty of action are not absolute (John F. Jelke Co. v. Beck, 208 Wis. 650, 666-7) and they may be regulated under the police power, but not suppressed under the guise of regulation. After careful study of the Act now before the court and of the conclusions and order of the Wisconsin Employment Relations Board in the cases at bar, the court is convinced that the legislature has made an earnest and sincere effort to regulate rather than to prohibit. This conclusion is reached with due recognition of the correctness of the following statement made in the sound and well-reasoned opinion of the Supreme Court of Nevada in City of Reno vs. Second Judicial Circuit, 95 Pac. Rep. (2d Ser.) 994, at 998:

> "'Organized labor has the rights of free speech, peaceful picketing and collective bargaining.'
>
> "The judicial notion, sometimes expressed, that there can be no such thing as peaceful picketing, is subscribed to by few courts, and repudiated by many. 'The doctrine,' said the court in George B. Wallace Co. v. International Ass'n of Mechanics, 155 Or. 652, 63 P. 2d 1090, 1095, 'that picketing is necessarily a species of coercion and intimidation is dogma long since discarded.' Goldfinger v. Feintuch, 159 Misc. 806, 288 N. Y. S. 855."

83 but also heeding the following equally sound and authoritative doctrine restated in the same case, as follows (P. 1000):

> "(3) While the net result of better reasoned judicial opinion is to that effect, it is

> universally held that if picketing goes beyond the allowable area of peaceful persuasion and assumes the form of intimidation, threats of violence, or impedes traffic, or interferes with the free use of property, or involves trespass or fraud, it is unlawful."

Mere reference to the comprehensive review of decided cases found in the opinion in City of Reno vs. Second Judicial Circuit, supra, obviates any citation of the same cases in this memorandum.

Chapter 38 of the Restatement of the Law of Torts entitled "Labor Disputes" deals with many phases of this subject and has afforded much help to the writer in his study. The same may be said of Annotations in 108 A. L. R. 1119, and 122 A. L. R. 1043, as well as prior annotations supplemented thereby. In connection with Schuster vs. Int. Ass'n of Machinsts (Ill. App.), 12 N. E. (2d Ser.), 50, 57, the following cases should also be considered: Swing vs. Am. Fed. of Labor (Ill. Sup. Court), 22 N. E. (2d Ser.), 857; Swing vs. Am. Fed. of Labor (Ill. App.), 18 N. E. (2d Ser.) 258; Local Union No. 26 etc. vs. City of Kokomo (Ind.), 5 N. E. (2d) 624, 108 A. L. R. 1111.

In harmony with the better reasoned judicial opinion set forth in the above quotation the legislature of this state enacted its definitions of unfair labor practices "for an employe individually or in concert with others" [Sec. 111.06 (2), Stats.] by giving cognizance to coercion, intimidation or a purpose to injure [subd. (a), (b), (f), (g)], to contract breaking [subd. (c)], to re-

84 fusal or failure to comply with, or obey, the final determination of tribunals vested with jurisdiction [subd. (d)], to the promotion or inducing of picketing or boycotting in disobedience to law [subd. (e)], to secondary boycott [subd. (g)], to mass picketing and interference with the use of streets and entrances [subd. (f)], to conspiracies to hinder or prevent lawful operations [subd. (g)], to take unauthorized possession of property of the employer [subd. (h)], to fail to give notice of intention to strike [subd. (i)], and the commission of crimes or disdemeanors [subd. (j)].

It does not seem necessary to present an extended argument that each and all of the foregoing acts and practices fall squarely within the state's right to legislate by virtue of its police power. The classification made is based upon substantial distinctions and existing circumstances of recognized importance and is obviously germane to the aims and purposes of the law and its well-known relation to the interests of public safety, welfare and prosperity. It has become a matter of common knowledge that the avoidance, or at least a substantial lessening, of the necessity for public relief is a legitimate objective of the state and of its citizens.

In passing, it should also be firmly noted that a similar public policy is obvious from the provisions of Section 103.53, Wis. Stats., and more directly from the following subdivisions of the first subsection and the plainly expressed restrictions made part thereof:

"(e) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, **without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or** threat thereof."

"(f) Ceasing to patronize or to employ any person or persons, **but nothing herein shall be construed to legalize a secondary boycott."**

["Secondary boycott" is also defined in Sub-sec. (12) of Sec. 111.02, Stats. and made an unfair labor practice by Subd. (g) of Sec. 111.06 (2) Stats.]

"(g) Assembling **peaceably** * * * to promote **lawful interests."**

"(j) Advising, urging, or inducing **without fraud, violence, or threat thereof,** others to do the acts heretofore specified * * *."

"(1) **Peaceful** picketing or patrolling * * * shall be legal."

It must also be noted that in the absence of **peaceful means** in a strike situation, Sec. 343.683, Stats., makes it punishable for "Any person to * * * attempt to hinder or prevent" any other person from continuing in any lawful work or employment "by threats, intimidation, force or coercion of any kind." This statute, in the opinion of the writer, applies to Finding 17 in the Plankinton House case. The Board was right in treating the conduct there found as an unfair

labor practice under Subd. (j) of Sec. 111.06 (2), Stats.

"Peaceful picketing or patrolling" has been previously discussed on pages 8 and 9 of this opinion. Peaceful patrolling and advertising of a truthful character conducted in the manner found by this court in the New Hostess Ice Cream Company case (No. 170-287) (See P. 5, supra) has been quite fully discussed on pages from 5 to 7, inclusive, supra.

86. The cases of Thornhill vs. State of Alabama and Carlson vs. California (84 L. ed. 659, 668), decided on April 22nd, 1940 (P. 6 hereof), involved legislative enactment abridging the freedom of speech or of the press as secured against state invasion by the Fourteenth Amendment of the United States Constitution. Unlike the cases at bar, criminal penalties were there prescribed. An extended analysis of the opinions in those cases may well be omitted, yet it should be noted that in the **Thornhill case**, the court found the accused was not guilty of any threats, intimidation, coercion, violence, or breach of peace, for all words spoken were uttered in a peaceful and orderly manner without putting anyone in fear, and the Code Section there attacked had been applied by the State Court

> "* * * so as to prohibit a single individual from walking slowly and peacefully back and forth on the public sidewalk in front of the premises of an employer, without speaking to anyone, carrying a sign or placard on a staff above his head stating only the fact

> that the employer did not employ union men affiliated with the American Federation of Labor * * *."

The court also pointed out that there was an absence of "picketing en masse." The state's right to enact reasonable regulations is also recognized in the following concise and definite statement:

> "The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted."

The exact statement last quoted will also be found in the last paragraph of the opinion in the **Carlson case**, supra. The accused, or appellant, in that case as stated in the opinion,

87 > "* * * did not threaten or intimidate or coerce anyone, did not make any loud noises at any time, and was peaceful and orderly in his demeanor. The pickets committed no acts of violence, and there was no breach of the peace."

The findings of the Board in the Plankinton House case, quoted on pages 10 and 11, supra, distinguish that case in a vital respect from the Thornhill and Carlson cases just discussed in that violence, coercion, intimidation and threats were found by the Board upon sufficient evidence. This court, upon mere review, would not be warranted in disturbing those findings. The record presents ample facts and circumstances to warrant the Board's further conclusion that the acts so found

characterized the entire campaign from its inception and its order that, for those reasons, it should be terminated.

For the same reason, and because of the entire cessation of the 1938 employment contract (pp. 15 to 18, supra), and upon the results of the election fairly conducted by the Board, its certification of the present representative of the employees of that hotel dated March 6, 1940, must also be sustained.

All of the terms used in the "Employment Peace Act" are sufficiently definite and have been judicially defined many times. These definitions have been accurately collated on pages from 33 to 43 of the brief submitted by the Plankinton House Company. The act is sufficiently definite and certain in terminology which may be said to include "well-understood concepts of the law" (Wis. Labor R. Board vs. Fred Rueping L. Co., 228 Wis. 473, at 495). As stated in that case their application to a particular case "must be left to the trier of fact if there is room for conflicting
88 inferences." In the cases at bar, the controlling facts are not in serious dispute, and the inferences drawn therefrom by the Board are fair and reasonable.

Although actual violence or breaches of the peace were not found by the Board in the Hotel Wisconsin case, the stationing of pickets at both the front and rear entrances of the hotel in the numbers disclosed by the record, the facts found in Finding 14 and the necessity of maintaining a police force at the hotel throughout the 24 hours

of each day during upwards of five months, when considered in the light of all the circumstances of the hotel controversy from its inception, must be held sufficient to support the Board's conclusions. (Century Building Co. vs. Wis. Employment Relations Board, 291 N. W., 305, 308.)

It is the duty of the court not to declare laws unconstitutional unless it clearly appears beyond reasonable doubt that they contravene constitutional safeguards. (Gibson Auto Co. vs. Finnegan, 217 Wis. 401, at 412-413; State ex rel. Atty. Gen. vs. Wis. Constructors, 222 Wis. 279, at 284, and cases cited.) With deference to that rule and for reasons hereinbefore stated as applicable to the entire Act, the court sustains as valid the provision requiring a secret ballot to call a strike and a ¾ affirmative vote for the making of an all-union agreement. Association, self-organization and concerted activities (P. 21, supra) will, in a large measure, be protected and promoted by the exercise of such rights of suffrage and expression. These provisions of the Act are reasonable as an effective regulation entirely germane to the scope and aims of the police power of the
89 state to enable groups of workers, many times numerically large, to give free and unhindered expression to their individual convictions and as to whether they consider differences with their employers of sufficient gravity to warrant the cessation of their employment with the attending hardships to themselves and their families during periods which many times become protracted as impressively brought home in the cases at bar.

The findings, conclusions, orders and certification of representatives made by the Wisconsin Employment Relations Board are in all things sustained and the attacks made thereon are overruled. Orders in conformity with this opinion may be presented for signature and filing.

Dated May 11, 1940.

Gustave G. Gehrz,
Circuit Judge.

90 **Cover.**

91–95 **JUDGMENT.**

(Venue and title omitted)

The above named petitioners' petition for a review of the final order of the Wisconsin Employment Relations Board, dated the 15th day of February, 1940, in the above entitled matter, seeking to set aside the said order of the Board
92 for the reasons therein assigned and the answer and cross-petition of the Board seeking an order confirming and enforcing the provisions of the said order referred to came on to be heard before this court without a jury, pursuant to the statutory method for review and enforcement of such an order, on the 8th and 9th days of April, 1940, Honorable Gustave G. Gehrz, Circuit Judge presiding. For purposes of hearing, the case was consolidated with the Milwaukee Hotel Wisconsin Company case, No. 170-383, which case presented similar issues, and the Plankinton House Company cases, Nos. 170-381 and 170-880, in which said cases the same petitioners sought review of a representation proceeding arising out of the same

labor dispute as is involved in this unfair labor practice case, No. 170-382.

The petitioners appeared by Padway, Goldberg & Tarrell and the respondent, Wisconsin Employment Relations Board, appeared by John E. Martin, Attorney General; James Ward Rector, Deputy Attorney General, and N. S. Boardman, Assistant Attorney General. At the commencement of the said hearing, Richardson, Robertson, Reeder & Stearns asked leave to appear as amicus curiae in this case, No. 170-382 and to file a brief for and on behalf of the Plankinton House Company; Shea & Hoyt asked leave to appear and file a brief amicus curiae for and on behalf of the Milwaukee Hotel Wisconsin Company in case No. 170-383; George E. Burns asked leave to appear amicus curiae and file a brief in the Plankinton House representation cases, Nos. 170-381 and 170-880; David Beznor asked leave to appear amicus curiae in the cases and file a brief on behalf of Harvester Employees Industrial
93 Union, and Lines, Spooner & Quarles asked leave to appear amicus curiae and file a brief, if later deemed advisable. All such requests were granted without objection, in the manner and as provided in the orders, filed.

After opening statements as to the nature of the cases and the issues involved and it appearing to the court that the first three named firms might more properly appear for and on behalf of their clients as parties, said clients having been parties in the proceedings before the Board and there being no objection thereto, the Plankinton

House Company was made a party respondent in this case, No. 170-382, appearing by Richardson, Robertson, Reeder & Stearns by Mr. Herman M. Knoeller; the Milwaukee Hotel Wisconsin Company was made a party respondent in case No. 170-383, appearing by Shea & Hoyt by C. F. Mikkelson, and the independent organization of Plankinton House Employees was made a party in the representation cases, Nos. 170-381 and 170-880, appearing by Mr. George E. Burns.

All parties participated in the oral argument, briefs were filed on behalf of all parties and a separate brief was filed by David Beznor, amicus curiae for and on behalf of the Harvester Employees Industrial Union, and the court having heard the arguments of counsel and having given careful consideration to the briefs filed and having taken the matter under advisement and being fully and sufficiently advised in the premises, and the court having on the 11th day of May, 1940, rendered and filed into written decision herein wherein judgment is directed as hereinafter adjudged.

94 Now on motion of John E. Martin, Attorney General; James Ward Rector, Deputy Attorney General; N. S. Boardman, Assistant Attorney General, attorneys for the Wisconsin Employment Relations Board, and Richardson, Robertson, Reeder & Stearns, attorneys for the respondent, Plankinton House Company, a corporation, and upon all the records, files and proceedings had herein,

It Is Ordered and Adjudged that the final order

of the Wisconsin Employment Relations Board, dated February 15, 1940, and the findings and conclusions of said board in the above entitled matter be and the same hereby is in all respects sustained, confirmed and enforced.

It Is Therefore Ordered and Adjudged That: The unions, Hotel and Restaurant Employees International Alliance, Local No. 122, International Laundry Workers, Local No. 174, Bartenders International League of America, Local No. 64, International Union of Operating Engineers, Local No. 311, and the Milwaukee Building Trades Council, the officers, members, agents, successors, and assigns of each, shall:

1. Immediately cease and desist from:

(a) Engaging in, promoting or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;

(b) Attempting to hinder or prevent by threats, intimidation, force, or coercion of any kind, the pursuit of lawful work by employes of the Plankinton House Company;

(c) Boycotting in any way the Plankinton House Company.

95 2. Take the following affirmative action:

(a) Post notices to their members in conspicuous places at the union headquarters that the union has ceased and desisted in the manner aforesaid, and that all officers, members and agents of the union are to refrain from engaging in promoting or inducing picketing and boycotting of the Plankinton House Company, and also to refrain from attempting

to hinder or prevent by threats, intimidation, force or coercion of any kind, the pursuit of lawful work by employes of the Plankinton House Company.

(b) Notify the Board in writing forthwith that steps have been taken by each of the unions to comply herewith.

It Is Further Ordered and Adjudged that this judgment be and become effective and enforceable as the judgment of this court as of this date and be entered accordingly.

It Is Further Ordered and Adjudged that the motion of the petitioners to vacate and set aside the said order be and the same hereby is denied.

Dated May 14th, 1940.

By the Court,
Gustave G. Gehrz,
Circuit Judge.

The above judgment is corrected and amplified to conform with the Court's written decision by inserting the words "and the findings and conclusions of said board," in the tenth line of page 4 thereof.

By the Court,
Gustave G. Gehrz,
Circuit Judge.

Dated May 14, 1940.

97–98 **Order to show cause why judgment should not be stayed.**

99–101 **Affidavits in support thereof.**

102 **Cover.**

103–109 **Affidavits in opposition to request for stay of judgment.**

110 **Cover.**

111–114 **ORDER GRANTING QUALIFIED STAY OF JUDGMENT.**

(Venne and title omitted.)

Whereas, on the 14th day of May, 1940, a judgment was duly entered in the Circuit Court of Milwaukee County in the above entitled action denying the motion of the petitioners to vacate and set aside the final order of the Wisconsin Employment Relations Board dated February 15, 1940, hereinafter mentioned, and also ordering and adjudging as follows to wit:

"It Is Ordered and Adjudged, That the final order of the Wisconsin Employment Relations Board, dated February 15, 1940, and the Findings and Conclusions of said board in the above entitled matter be and the same hereby is in all respects sustained, confirmed and enforced.

"It Is Therefore Ordered and Adjudged, That the unions, Hotel and Restaurant Employees International Alliance, Local No. 122, International

Laundry Workers, Local No. 174, Bartenders International League of America, Local No. 64, International Union of Operating Engineers, Local No. 311, and the Milwaukee Building Trades Council, the officers, members, agents, successors, and assigns of each, shall:

112 "1. Immediately cease and desist from:

(a) Engaging in promoting or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;

(b) Attempting to hinder or prevent by threats, intimidation, force, or coercion of any kind, the pursuit of lawful work by employees of the Plankinton House Company;

(c) Boycotting in any way the Plankinton House Company.

"2. Take the following affirmative action:

(a) Post notices to their members in conspicuous places at the union headquarters that the union has ceased and desisted in the manner aforesaid, and that all officers, members and agents of the union are to refrain from engaging in promoting or inducing picketing and boycotting of the Plankinton House Company, and also to refrain from attempting to hinder or prevent by threats, intimidation, force or coercion of any kind, the pursuit of lawful work by employees of the Plankinton House Company.

(b) Notify the Board in writing forthwith that steps have been taken by each of the unions to comply herewith.

"It Is Further Ordered and Adjudged that this judgment be and become effective and en-

forceable as the judgment of this court as of this date and be entered accordingly.

And the said petitioners being aggrieved by said judgment intending to appeal therefrom to the Supreme Court of the State of Wisconsin, having applied to this Court for an order granting a stay of said judgment and the order made thereby and by said Wisconsin Employment Relations Board, which motion for stay duly came on before the Court and was heard on May 16, 1940, at 2 o'clock p. m., Padway, Goldberg & Tarrell, attorneys for said petitioners appearing in support of said motion, and John E. Martin, Attorney General, and N. S. Boardman, Assistant Attorney General, appearing for said Wisconsin Employment Relations Board in opposition thereto, and Richardson, Robertson, Reeder & Stearns, by Herman M. Knoeller, appearing for the Plankinton House Company in opposition thereto, and the Court being sufficiently advised in the premises.

Now, upon the affidavit of Phil L. Valley, filed May 16, 1940, upon the affidavit of Hiram O. Wood, filed on the same day, upon the findings of fact and conclusions of law of said Wisconsin Labor Relations Board, its said order made there-
113 upon, the judgment duly entered by the Court on May 14, 1940, and upon all the evidence, record and files herein, the Court being satisfied that it should at this time exercise its equitable powers and act in accordance with the equitable principles governing judicial action, and that the exigencies of this case require the determination hereinafter made,

It Is Ordered that petitioners' said motion for stay be and the same hereby is denied as to "cease and desist" orders of said Wisconsin Labor Relations Board lettered (b) and (c) and reading as follows:

> "(b) Attempting to hinder or prevent by threats, intimidation, force or coercion of any kind, the pursuit of lawful work by employees of the Plankinton House Company;
>
> "(c) Boycotting in any way the Plankinton House Company."

It Is Further Ordered that petitioners' said motion for stay be and the same hereby is denied as to "cease and desist" order of said Board lettered (a) and reading as follows:

> "(a) Engaging in, promoting or inducing picketing at or near the Plankinton House or the Kilbourn Hotel,"

provided, however, and subject only to the permissive provision and conditions following, to wit:

> (1) That pending the determination of their intended appeal and subject to any further or other orders of this court as hereinafter stated, said petitioners may between the hours of 7 and 8 o'clock a. m., 11:45 a. m. and 1:45 o'clock p. m. and 6 and 7:30 o'clock p. m. on days other than Sunday conduct fair and truthful advertising within the outer or curb side, one-third of the public streets in front of the hotel buildings of the Plankinton House or Kilbourn Hotel, but not in any adjoining alleys or passageways.
>
> (2) Such advertising shall not mention any

alleged labor dispute or controversy as existing between employees or either of said employers, or any alleged unfairness of conduct of the latter, and shall only be conducted by means of not more than two persons on each side of the hotel each carrying or displaying a truthful banner or sign and passing and repassing along the full length of the front sides of said hotels (the entire Michigan side of the Plankinton House to be deemed one front or side).

(3) The announcements upon said banners or signs shall not be added to by any oral statements or arguments and in any event without the use of any molesting, offensive or provocative language or such as may have a tendency to cause or stir up disputes or breaches of the peace.

114 (4) Such advertising shall be conducted without intimidation or coercion or any method involving fraud, misstatement of fact, violence, breach of the peace, or threat thereof and without impending, or interfering with, the free use by others of the streets or highways or of the doors, entrances or exits of said hotels, and without hindering, or interfering with the loading or unloading of any baggage, merchandise or articles of any kind at any door, entrance or platform of either of said hotels.

(5) This court reserves jurisdiction and power to terminate the foregoing provisions or conditions in the event of any noncompliance or violation thereof.

(6) Said petitioners shall furnish an undertaking to be approved by the court and to be in the sum of one thousand ($1,000) dollars

for the payment of all damages as provided in Section 274.23, Wisconsin Statutes.

(7) Said petitioners will serve and perfect their said appeal and prosecute the same with all reasonable speed and in accordance with the rules and directions of the Supreme Court of Wisconsin.

It Is Further Ordered that said motion for stay as to directions to take affirmative action (order 2 of the Board) be and the same hereby is denied except that the direction therein with respect of picketing be modified or qualified to permit said petitioners to conduct fair and truthful advertising in the manner and subject to the conditions hereinbefore set forth.

Dated May 17, 1940.

By the Court:

Gustave G. Gehrz,
Circuit Judge.

115 **Cover.**

116 **Notice of entry of order granting qualified stay of judgment.**

117–120 **Qualified stay of judgment** (R. 111 through 114, C. 52 through 57).

121 **Cover.**

122–123 **Notice of appeal.**

124 **Cover.**

RECORD OF PROCEEDINGS

Before the Wisconsin Employment Relations Board.

125 **Cover.**

126–128 **Certificate of Wisconsin Employment Relations Board.**

129– **COMPLAINT.**

138 (Venue and title omitted.)

Now comes the above-named complainant, Plankinton House Company, by Richardson, Robertson, Reeder & Stearns, its attorneys, and files its complaint in writing, charging the above-named respondents with having engaged and still being engaged in unfair labor practices within the meaning of Section 111.06 of the Wisconsin Statutes and alleges and shows to the Board as follows:

1. That complainant, Plankinton House Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin and engaged in the general hotel business with its principal office at 609 North Plankinton avenue, Milwaukee, Wisconsin, and operates the "Plankinton House" and the "Kilbourn Hotel" in said city and state.

130 2. That the respondents, Hotel & Restaurant Employees International Alliance, Local No. 122, with its principal office at 734 North Third street, Milwaukee, Wisconsin; International Laundry

Workers, Local No. 174, with its principal office at 1012 North Third street, Milwaukee, Wisconsin; Bartenders International League of America, Local No. 64, sometimes known as International Bartenders & Beverage Dispensers, Local No. 64, with its principal office at 744 North Sixth street, Milwaukee, Wisconsin; International Union Operating Engineers, Local No. 311, with its principal office at 2401 West Wisconsin avenue, Milwaukee, Wisconsin; and Milwaukee Building Trades Council, with its principal office at 2218 North Third street, Milwaukee, Wisconsin, are labor unions and voluntary unincorporated associations of more than seven members, having a recognized group name, and doing business in Milwaukee, Wisconsin, by their duly authorized officers, executives, and business agents, and that the members of said labor unions are so numerous and to a large extent unknown so that it is impracticable to bring them all before the Board; that the respondents, Phil L. Valley, John Alexander and Jack Heisdorf, are made respondents herein as business agent, organizer and vice-president, respectively, of Hotel & Restaurant Employees International Alliance, Local No. 122, and as representatives of all the members of said last mentioned local union in addition to being joined individually as respondents.

3. That the total number of employees of the Plankinton House, exclusive of the general manager, H. O. Wood, and the resident manager, J. N. Hoffman, is one hundred sixty (160), of which number eighty-two (82) employees have either

returned to work or continued to work after the hereinafter illegal strike was called by the respondents, and that the number of employees not working at the present time and involved in the hereinafter alleged unfair labor practices does not exceed seventy-eight (78).

131 4. That the nature of the work usually performed by the employees involved in the hereinafter alleged unfair labor practices consists of the usual and customary hotel work incidental to and necessary for the operation of the Plankinton House, a hotel located at 609 North Plankinton avenue, Milwaukee, Wisconsin, and owned and operated by the complainant herein; more particularly, said employees were previously engaged in the discharge of their duties as bell men, elevator operators, housekeepers, launderers, barroom attendants, general maintenance men, painters, musician, waitresses, and attendants in the operation of the kitchen and coffee shop of said last mentioned hotel.

5. That on or about June 16, 1938, the complainant and the respondent unions entered into a contract covering the terms and conditions of employment of certain people employed at the Plankinton House; said unions were recognized as the exclusive bargaining agent for the employees who came within the jurisdiction of the respective unions; said contract was to be effective commencing June 16, 1938, and to continue for a period of one year ending on June 15, 1939, and to continue for subsequent consecutive one-year renewals thereof unless either party thereto

served notice in writing on the other party at least thirty days before the expiration of such year that such party desired to terminate the contract at the end of such current year; it was further provided in said contract that either party thereto may serve notice in writing upon the other party within thirty days of the termination of such contract year that it desired that such contract continue for an additional year and that such party desired to negotiate hours, wages, and working conditions for the following contract year and that when such notice was sent and the other party had not sent any cancellation notice, the contract should continue in force, and the terms agreed upon by subsequent negotiations should be retroactive from the date of the commencement of any such year, and that in the
132 event the parties could not reach an agreement through negotiations on or before thirty days after the termination of the preceding contract year, the differences should be submitted to arbitration; on May 15, 1939, the respondent unions, through their attorneys, gave notice to the complainant that they desired to negotiate changes in the existing contract for the coming year, and the complainant likewise served notice of proposed changes in said contract; thereafter the parties to said contract entered into negotiations for the purpose of agreeing upon the proposed changes to such contract until July 11, 1939, when the respondent unions, through their attorneys, notified the complainant in writing that it appeared impossible for the parties to agree upon

terms by negotiation and demanded arbitration and at the same time designated the respondent, Phil L. Valley, and Attorney I. E. Goldberg as their representatives on the arbitration board. On or about July 15, 1939, the complainant, together with other hotels involved in negotiation with the respondent unions, appointed two representatives for said arbitration board, and thereafter Alfred H. Handrich was appointed by the Wisconsin Employment Relations Board as the fifth and impartial arbitrator; the arbitration board thus composed to hear and determine the terms of a new labor contract to be executed by the parties convened from time to time, and the complainant with its attorneys and the respondents with their attorneys appeared before said arbitration board and fully presented and argued the demands and proposed revisions in the new labor contract to be executed by the parties. After hearing and duly considering all the evidence presented and arguments made, the said board of arbitration on October 30, 1939, rendered its award, providing, among other things, that if the respondent unions desire an all-union agreement, all employees covered by the labor contract and subject to the jurisdiction of the unions should be and remain members in good standing in their respective unions in order to retain employment provided that three-fourths or more of the employees in each proper collec-
133 tive bargaining unit shall have voted affirmatively by secret ballot in favor of an all-union agreement in a referendum conducted by the Wiscon-

sin Employment Relations Board. Upon the receipt of a copy of the award on November 1, 1939, your complainant through its attorneys notified in writing the attorneys representing the respondent unions that it agreed to the arbitration award and upon the acceptance of the award by the respondent unions it would execute a contract in accordance with the terms of the decision of said board of arbitration. The respondent unions failed, neglected, and refused to accept the award and did call an illegal strike and walk-out on November 2, 1939, when the Wisconsin Education Association held a convention in the City of Milwaukee and most of the hotels of the City of Milwaukee, including the Plankinton House, were filled with Wisconsin school-teachers as guests, thereby seriously interfering with hotel service, and since said time the said respondents have engaged and are engaging at the present time in the hereinafter mentioned unfair labor practices within the meaning of Section 111.06 of Chapter 57 of the 1939 Laws of Wisconsin, commonly known as the Wisconsin Employment Peace Act.

6. That the overt acts in carrying out said illegal acts and walk-out and the unfair labor practices engaged in by the respondents in violation of the above-mentioned Wisconsin Employment Peace Act were many and varied, but among the numerous instances thereof your complainant specifies the following:

(a) That ever since November 2, 1939, the respondent labor unions and certain of their members, at the direction and instigation of the re-

spondents, Phil L. Valley, John Alexander and Jack Heisdorf, co-operated in engaging in, promoting or inducing picketing, boycotting and other overt concomitants of a strike without having a majority of the employees of the complainant in the collective bargaining unit vote by secret ballot to call a strike in violation of Section 111.06 (2) (e) of the Wisconsin Statutes.

134. (b) That at numerous times since November 2, 1939, the respondents have materially hindered and prevented by mass picketing threats, intimidation, force and coercion of various kinds the pursuit of lawful work and employment and obstructed and interfered with the entrance to and the egress from the Plankinton House and obstructed and interfered with the free and uninterrupted use of the streets and highways in and around the Plankinton House, in violation of Section 111.06 (2) (f) of the Wisconsin Statutes, to wit: On November 4, 1939, an employee, William Komes, of the complainant attempted to open the sky room door of the Plankinton House for the purpose of letting a delivery man employed by August F. Kellner Company, florists, Milwaukee, Wisconsin, carry in floral decorations loaned to the Wisconsin-Upper Michigan Florists Association, which was holding a convention in said sky room, when the respondents, under the leadership of Jack Heisdorf, vice-president of Local Union No. 122 mentioned above, rushed to the sky room door entrance, forcefully shoved the door back into the face of the complainant's em-

ployee, and attacked the delivery man carrying the floral decorations, which were then and there seized, thrown to the sidewalk, trampled upon, damaged and destroyed by the respondents and certain of their members acting as pickets and all further attempts to make delivery were prevented until the police arrived, opened the picket line, and arrested certain members of the respondent labor unions, including Jack Heisdorf.

(c) That ever since November 2, 1939, the respondent labor unions and certain of their members, especially the officers of Local Union No. 122 heretofore mentioned, have engaged in a secondary boycott and hindered or prevented, by threats, intimidation, force and coercion, the obtaining, use and disposition of materials, equipment and services, and continue to so prevent persons from making deliveries to or from said hotel; all in violation
135 of Section 111.06 (2) (g) of the Wisconsin Statutes, to wit: On November 4, 1939, the Automotive Electric Association was holding a convention in Milwaukee and two of its salesmen drove up to the delivery door of the Plankinton House for the purpose of unloading displays and samples carried in their automobile, when the respondents, Phil L. Valley and Jack Heisdorf, together with a large number of members belonging to the respondent unions, stepped between said salesmen and the employees of your complainant who sought to assist said salesmen and prevented any delivery; said respondent, Phil L. Valley, assaulted and battered Harvey Weber, an employee of your complainant, and said respondent, Jack

Heisdorf, used threats and intimidation toward him; also, on November 5, 1939, the complainant sought to make a delivery of clean wash by automobile from the Plankinton House to the Kilbourn Hotel, but just as soon as the delivery door of the Plankinton House was open the two pickets parading in front thereof gave a signal to a large number of men standing across the street, who then formed a flying squadron and in mass formation paraded so menacingly and closely to the delivery door that it was impossible to carry out and load the wash for delivery.

(d) That on November 10, 1939, the respondent labor unions and certain of their members, especially the respondent, Jack Heisdorf, and one Charles Alden, did, by the use of threats, intimidation, force and violence, take unauthorized possession of four large cans of cube ice which was being delivered to the Plankinton House and did then and there dump the cube ice in the public street, damaging and destroying the same beyond use, and at the same time assaulted and battered several employees of your complainant, especially Robert Jeské, who attempted to deliver said ice to the hotel, all in violation of Section 111.06 (2) (g) and Section 111.06 (2) (h) of the Wisconsin Statutes.

(e) That said respondent labor unions and certain of their members have coerced and intimi-
136 dated and are now engaged in the coercion and intimidation of various employees of the complainant in the enjoyment of their legal rights guaran-

teed in Section 111.04 of the Wisconsin Statutes, and particularly in their legal rights to work, as well as security in their person and property, and with the full knowledge of the respondents several of their members have committed various misdemeanors during the course of and in connection with the conduct of said illegal strike, all in violation of Section 111.06 (2) (a) and Section 111.06 (2) (j) of the Wisconsin Statutes, to wit: On November 7, 1939, at 10 o'clock a. m., while Paul Ziebell was standing within the doors of the Plankinton House with two sample cases of a guest, one of the pickets, James O'Brien, alias Pat O'Brien, employed by the respondent unions and carrying a picket sign, left the picket line and entered the hotel and did then and there violently assault and batter said Paul Ziebell and also tore the uniform worn by Lester Raasch, also an employee, as a result of which said James O'Brien was arrested; that said James O'Brien had been guilty of previous illegal conduct several days prior thereto because of the use of abusive language and spitting upon employees of the hotel and had been so warned by the police, and upon information and belief the said James O'Brien is a prizefighter residing in Chicago, Illinois, and had been ordered two weeks before the aforesaid fracas by the Judge of the Milwaukee District Court to leave town after serving ten days in the House of Correction in lieu of a $25 fine imposed for disorderly conduct; also, on November 11, 1939, Fred Langdon, a valet employed by your complainant, was, upon information and

belief, interrogated, assaulted and battered by members, agents or employees of the respondents while he was enjoying a glass or beer at a tavern; on November 9, 1939, Elmer Hundt, an employee of the complainant, was called a vile and indecent name on the public street directly in front of the Plankinton House by a union man and picket who was conversing with a union overseer of the picket
137 line, and said Elmer Hundt was threatened and intimidated by said overseer; on November 4, 1939, Peggy Hehmeyer, an employee of the complainant, and on November 5, 1939, and November 6, 1939, James Myrick, also an employee of the complainant, were called vile and indecent names and threatened and intimidated in the enjoyment of their legal rights guaranteed by Section 111.04 of the Wisconsin Statutes by the respondents and certain members of their unions.

(f) That ever since November 2, 1939, the respondent unions and certain of their members have coerced and intimidated and now are engaged in the coercion and intimidation of various employees of the complainant in the enjoyment of their legal rights guaranteed under Section 111.04 of the Wisconsin Statutes, and particularly in their legal rights to work, as well as security in their person and property, but that said violations are so numerous and constant that they cannot be stated in this complaint without unduly extending the same beyond a clear and concise statement, and the complainant reserves the right to introduce evidence thereon and on all subsequent unfair labor practices committed be-

tween the time of the filing of this complaint and a hearing before the Board.

Wherefore, your complainant prays that it may have relief under and pursuant to Chapter 111 of the Wisconsin Statutes, to wit:

(a) That a hearing be had on this complaint at an early date.

(b) That the complainant have such relief as is directed and warranted under Chapter 111 of the Wisconsin Statutes including, specifically, the entry of proper orders:

(1) To protect the rights of the complainant to operate its business and especially the Plankinton House and the Kilbourn Hotel under conditions of law and order and free from all mass picketing, threats, intimidation, force, and coercion; and

138 (2) To protect the rights of such of its employees who desire to work; and

(3) To prevent the respondents and their members in the conduct of the strike from intruding into the primary rights of complainant's employees to earn a livelihood and from intruding directly into the primary rights of the complainant to lawfully transact its business and from intruding directly into the primary rights of both the complainant and its employees to engage in the ordinary affairs of life by any lawful means, free from molestation, mass picketing, threats, intimidation, interference, restraint, force, violence or coercion; and

(4) To eliminate from this strike the conditions caused by the respondents, which amount to the

primitive methods of trial by combat, which are directly declared to be contrary to the public policy of the State of Wisconsin by section 111.01 (4).

(c) That the Board ascertain and determine which of the members of the respondent labor unions have committed, or have been parties to, any unfair labor practices and to declare that such persons are no longer employees of the complainant, as defined by Section 111.02 (3) (b) of the Wisconsin Statutes.

(d) That the Board make such further findings and such further orders as the complainant may be entitled to under the statutes of the State of Wisconsin in such case made and provided.

139 **Verification.**

140 **Cover.**

141–142 **Notice of hearing.**

143–152 **ANSWER**

(Venue and title omitted.)

143 Now come the above-named respondents, by their attorneys, Padway, Goldberg & Tarrell, and by way of answer to the complaint filed by the above named complainant in the above-entitled matter, admit, deny and allege as follows:

I.

The respondents deny that they have engaged in and that they still are engaging in unfair labor

practices within the meaning of Section 111.06 of the Wisconsin Statutes, as charged by the complaint above named.

II.

144 Answering paragraph numbered 1 of said complaint respondents, upon information and belief, believe that the name of the company, its principal office, and the general nature of its business are as stated in said paragraph.

III.

Respondents allege that the names and addresses as set forth in paragraph numbered 2, are substantially correct.

IV.

Answering paragraph numbered 3 of said complaint respondents allege that the facts as to the total number of employees of the complainant, as to the total number who returned to work or didn't go out on strike, are peculiarly within the knowledge of complainant, and respondents, therefore, have not the means to correctly allege the number so involved, and, therefore, denies the same and put complainant to its proof concerning the same.

Further answering said paragraph, upon information and belief respondents deny that the total number of employees is as stated in said paragraph; deny that the total number who have either returned to work or continued to work after the strike was called are in the numbers

stated; and deny that the number of employees not working at the time the complaint was filed and involved in the strike does not exceed 78, and in regard thereto puts complainant to its proof concerning the same.

Further answering said paragraph respondents deny that the strike is illegal or was called illegally.

V.

145 Answering paragraph numbered 4 of said complaint respondents deny that the employees referred to in said paragraph are engaged in unfair labor practices.

IV.

Answering paragraph numbered 5 of said complaint respondents admit that on or about June 16, 1938, the complainant and the respondent unions entered into a contract covering the terms and conditions of employment of certain people employed at the Plankinton House; that the unions were recognized as the exclusive bargaining agents for the employees who came within the jurisdiction of the respective unions, and allege that said contract further provided for what is commonly known as a closed shop or all-union shop, which provided that all employees subject to the jurisdiction of the unions shall be and remain members in good standing in the union in order to retain their jobs, and which provided further that new employees, where the union could not furnish the employer with employees, and also in cases of emergency, might be employed

by the employer even though such persons were not members of the union, provided such employees became members of the union within fifteen days from the date of employment; that by said contract employer agreed not to keep in his employ any employee then a member or who thereafter became a member of the union who relinquishes his membership in the union.

Respondents admit that the contract was to be effective commencing June 16, 1938, and was to continue for a period of one year, ending June
146 15, 1939, and for subsequent consecutive one year renewals unless either party thereto served notice in writing on the other party at least thirty days before the expiration of such year that such party desired to terminate the contract at the end of such current year; that said contract further provided that either party may serve notice in writing upon the other party within thirty days before the termination of such contract year that it desired that such contract continue for an additional year and that such party desired to negotiate hours, wages, and working conditions for the following contract year, and that when such a notice was sent and the other party had not sent any cancellation notice the contract continued in force and the terms agreed upon by the subsequent negotiations would be retroactive from the date of the commencement of any such year, and that in the event the parties could not reach an agreement through negotiations on or before thirty days after the termination of the preceding contract year the dispute should be submitted to arbitration.

Respondents deny that all of said unions notified complainant that they desired to negotiate changes in the existing contract, as alleged in the complaint in paragraph numbered 5, and deny that complainant served notice on all of the respondent unions that complainant desired changes. Respondents allege in regard thereto that by virtue of whatever notices were served upon any of the respective parties the contract afore referred to continued in force for another contract year, but that changes affecting hours, wages, and working conditions, as embodied in the demands of Local 122, Hotel & Restaurant Employees' Union, af-
147 fected only said union and not any of the other respondent unions.

Respondents Laundry Workers, Bartenders, Operating Engineers, and Building Trades unions deny that any notice was sent them by complainant, and deny that complainant sent them any notice in accordance with the terms of the contract requesting changes in the contract for the year commencing June 16, 1939, and ending June 15, 1940.

Respondents allege that by virtue of the labor contract afore referred to, and by operation of law, the contract afore referred to continued without any changes for the Bartenders, Engineers, and Building Trades unions; that said contract continued in all respects excepting the question of vacations with pay for the Laundry Workers' Union; that said contract continued in all respects excepting as to such changes demanded by Local 122, Hotel and Restaurant Employees' Union, for Local 122, and particularly in all of said instances

the closed shop clause of said contract continued for the contract year ending June 15, 1940.

Respondents further allege that negotiations referred to in said paragraph numbered 5 were on the changes demanded by Local 122, Hotel & Restaurant Employees' Union; that a question arose as to whether or not negotiations were proper on the changes proposed by complainant as affecting Local 122, Hotel & Restaurant Employees' Union, and alleges that in any event the closed-shop clause was not a subject for change.

Further answering paragraph numbered 5, respondents allege that arbitration was had subject to objections on the part of the unions on the scope of said arbitration, and that a majority of
148 the Board had rendered an advisory award, which was not binding upon any of the parties unless both parties agreed thereto. Respondents further allege that erroneously said award purported to affect all respondent unions. Respondents further allege, upon information and belief, that the so-called fifth arbitrator erroneously included in the arbitration award a provision that if the unions desired an all-union agreement (closed shop) the same might be had upon a three-fourths vote, as alleged in the complaint; that said fifth arbitrator erred in including such provision in the advisory arbitration award in that he ignored the terms of the contract and misinterpreted the law upon which he based such award.

Respondents further allege that such advisory arbitration award exceeded the bounds of the ar-

bitration, was contrary to law, and was unacceptable to the unions; that it proposed to cover some of respondent locals which had not submitted their matters to arbitration, and of whom the complainant requested no arbitration.

Respondents further allege that by the terms of the arbitration and the contract the arbitration was of no effect unless the parties thereto mutually accepted the same, and that the union had the right to strike and the employer to lock out the union in the event either party did not care to accept such arbitration award.

Further answering said paragraph numbered 5 respondents allege that the strike was called in furtherance of a labor dispute affecting said complainant, and that said strike, advertising, picketing, refusal to work are legal and an exercise of the constitutional rights of free speech and free
149 assemblage of all respondents; that the exercise of such rights, privileges and immunities afforded by the constitutions of both the United States and the State of Wisconsin do not afford any cause for action in behalf of complainant, and any other person or persons; that any alleged or attempted legislation to the contrary is and would be unconstitutional and void; that the so-called Chapter 57 of the Laws of Wisconsin 1939, and commonly known as the Wisconsin Employment Peace Act, is unconstitutional and void and of no effect whatsoever.

VII.

Answering paragraph numbered 6 of the complaint herein respondents reallege such matters

alleged in answer to paragraph 5, which are applicable to paragraph numbered 6, and specifically deny any overt acts illegal in nature or the doing of any illegal acts, and deny engaging in any unfair labor practices and violations of any act, alleged or otherwise.

Answering subdivision (a) of paragraph numbered 6 in said complaint respondents deny that Section 111.06 (2) (c) has any legal effect and application in regard thereto; that the same is unconstitutional and void; respondents deny that the named respondents mentioned in said paragraphs 6 (a) were guilty of any acts, alleged or otherwise, which were in violation of law, or that there can be a violation of an illegal and unconstitutional act, or of illegal provisions of law.

Answering subdivision (b) of paragraph numbered 6 of said complaint respondents deny the same.

Answering subdivision (c) of paragraph numbered 6 of said complaint respondents deny the same.

Further answering, subdivision (c) of paragraph numbered 6 respondents allege that the strike was called in furtherance of a labor dispute affecting said complainant; that deliveries ceased, and union-minded persons refused to go through a picket line or have anything to do with complainant, which is looked upon and treated as unfair to **organized labor** by organized labor; that the acts of picketing, advertising, refusal to go through the picket line, and refusal to transact

business with complainant were performed by respondents or other persons sympathetic with the union's cause, in furtherance of the exercise of the constitutional rights of free speech and free assemblage of said respondents; that the exercise of such rights, privileges and immunities, afforded by the Constitutions of both the United States of America and the State of Wisconsin, do not afford any cause for action to complainant or any other person arising out of the matters referred to in this allegation.

Answering subdivision (d) of paragraph numbered 6 of said complaint, respondents deny the same.

Answering subdivision (e) of paragraph numbered 6 of said complaint, respondents deny the same.

Answering subdivision (f) of paragraph numbered 7 of said complaint, respondents deny the same.

VIII.

Further answering said complaint respondents deny each and every material allegation not heretofore specifically admitted, denied or qualified.

151 Further answering the complaint herein, respondents allege that complainant does not come before the Wisconsin Employment Relations Board with clean hands, and alleges in regard thereto that complainant has been guilty of engaging, and is still engaging, in unlawful labor practices within the meaning of Section 111.06 of the Wisconsin Statutes, if said act were con-

stitutional, which respondent denies; that respondents charge complainant with having violated Section 111.06 (1), (a), (b), (c), (f) and (1) in that said complainant has interfered with, restrained and coerced employees in the exercise of the rights guaranteed in Section 111.04 of the Wisconsin Statutes in that it has initiated, created, dominated, encouraged the formation of a company union, and it has discouraged membership in the respondent unions; that it violated the terms of a collective bargaining agreement, and committed a crime and misdemeanor in connection with the controversy arising out of the employment relations between the complainant and members of the respondent unions.

Further answering said complaint, respondents allege that said complainant is engaged in interstate commerce; that by virtue of the nature of the business of the said complainant in that the same is in interstate commerce and affects interstate commerce, the so-called Wisconsin Employment Relations Act, known as Chapter 57 of the Laws of Wisconsin 1939, does not affect the operation of said complainant.

That the law applicable to employment relations, affecting complainant and its employees, is covered by the National Labor Relations Act
152 (U. S. Code, Title 29, Chapter 7, paragraphs 151 through 166).

That the Wisconsin Employment Relations Board has no jurisdiction in matters affecting the employer-employee relationship of complainant and its employees, nor over respondents, concerning the matters alleged in said complaint.

Further answering, respondents allege that particularly in such matters where the Wisconsin Employment Relations Act differs from the National Labor Relations Act the same is not applicable to an employer-employee relationship involving employers engaged in interstate commerce.

Further answering said complaint, respondents allege that the Wisconsin Employment Relations Act, known as Chapter 57 of the Laws of the State of Wisconsin for the year 1939, is unconstitutional and void.

Wherefore, respondents pray that the complaint of said complainant be dismissed in accordance with law.

153 **Verification.**

154 **Cover.**

155 **Petition for intervention by Independent Union of Plankinton House Employees.**

156 **Verification.**

157 **Cover.**

158- **Petition of Independent Union of Plankinton**
159 **House Employees for determination of representation.**

160 **Cover.**

TESTIMONY.

161–834 TESTIMONY.

161–163 Index to witnesses.

164–166 List of exhibits.

167 Appearances:

Richardson, Robertson, Reeder & Stearns, by C. M. Robertson, Esq., and Herman M. Knoeller, Esq., on behalf of the complainant.

Padway, Goldberg & Tarrell, by I. E. Goldberg, Esq., on behalf of the respondents.

George Burns, Esq., on behalf of the Independent Organization of the Plankinton House Employees.

168–170 Discussion with respect to pendency of Circuit Court action involving same subject matter.

170 Mr. George Burns: As the attorney for the Independent Organization of the Plankinton House Employees, I am filing a petition for intervention in these proceedings and also a petition for an election to be held amongst the employees of the Plankinton House Company at the Plankinton House, the Plankinton House Parking Station and the Kilbourn Hotel.

171 Mr. Goldberg: I object to the petition for intervention since the Independent Union is a company union and to the petition for election because the rights of the parties have been fixed by contract, and because a petition for election and determination of representatives has been filed by

Local 122, one of the respondents, with the National Labor Relations Board about three weeks ago.

172 In addition to the above objections to the petition for intervention and the petition for an election, respondents move that these proceedings be dismissed for the following reasons:

1. Plankinton House Company is engaged in interstate commerce, and therefore the proper tribunal to hear the matter is the National Labor Relations Board.

2. Chapter 57 of the Laws of Wisconsin 1939 is unconstitutional and void.

3. On the face of the pleadings it appears that there is a contract in existence which by operation of law and the acts of the respective parties continues to June 15, 1940.

Commissioner Gooding: The motions will be denied and the motion on behalf of the Independent Organization of Plankinton House Employees to intervene is granted, as well as the petition for election.

172–177 Preliminary statement by counsel for complainants.

177–181 Preliminary statements by counsel for respondents.

181 Mr. Goldberg: I stipulate that there was no ballot taken in accordance with the provisions of Section 111.06, Subsection (e), Wisconsin Statutes 1939.

184 **PHIL L. VALLEY,**

a witness called adversely by the complainant, being first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Knoeller.

My name is Phil Valley and I am the business manager of Local 122, Hotel & Restaurant Employees Local Union. I hold no other office with that union. Mr. Al Gamby is the president.

185 My official duties are to book all jobs, handle all contracts, see that the other officers do their work in their territory and keep their territory clean by keeping all union members on the jobs and seeing to it that their dues are paid and that they are in good standing with the local union. I have the right to call a strike when it is authorized by the body. When a strike is called I appoint a picket captain, who has the full power to act in putting on pickets and handling pickets.

186- (There was marked, identified by the witness or
195 stipulated by counsel, and introduced into evidence the following described exhibits:

Exhibit 1. The 1938 collective bargaining agreement existing between the respondent union, Local 122, and the Plankinton House Company.

Exhibit 2. Notice, dated May 15, sent by the union, stating its intention to continue the contract, but to negotiate changes.

Exhibit 3. Notice, dated May 11, sent May 15, to Local 122, received May 16 by Local 122, indicating the intention of the Plankinton House to revise certain terms.

Exhibit 4. Union's request for negotiations, dated May 29, 1939.

Exhibit 5. Revisions requested by the union, dated June 27.

Exhibit 6. Revisions requested by the Company under date of July 1, 1939, delivered July 3, 1939.

Exhibit 7. Demand by union for arbitration.

Exhibit 8. Consent to naming of fifth arbitrator by Wisconsin Employment Relations Board.

Exhibit 9. Arbitration award, Phil L. Valley and Arthur Johnson, union representatives, dissenting, October 30, 1939.

Exhibit 10. Acceptance by hotel of award dated November 1, 1939.

Exhibit 11. Acknowledgment of hotel's acceptance by union.

Exhibit 12. Letter sent November 11, asking for 10 per cent increase and signature to supplemental agreement.

Exhibit 13. Letter sent November 28, calling attention to the fact that the hotel must still employ employees who are members in good standing in the union.)

192 On November 2, 1939, I directed all the waitresses and all the workers to cease work. I had been in the hotel for two days talking to Mr. Wood and called Mr. Robertson before I pulled the strike.

193 I did not direct those workers to form a picket line nor did I bring any other pickets to the hotel. The members of the union started to picket as

soon as they walked out of the hotel. They started at about 4 o'clock and it was 5 or 5:30 before they all left their employment. I would say that there were 75 or 80 in the picket line. These seventy-five were not at each entrance of the hotel, but were all around the hotel and split up at each entrance. Picketing is continuing to this day and hour.

197 As business agent of Local 122, I have under my control the 1937 contract and I also have the notices of revisions demanded by the unions in 1938 for the purpose of modifying the then existing contract, the 1937 contract that was about to expire in 1938. I will produce them for the Board.

198 Mr. John Heisdorf is a member of Local 122 and has been for at least six years that I know of. He holds the position of vice-president.

199 He has held that office for one year and his duties are to act as business agent in territory assigned to him.

The chairman of the picket captains is John Alexander, who has appointed Mr. Heisdorf to take charge of the pickets at the Plankinton and Kilbourn Hotels and to oversee the union activities in such hotels. I am present at times on the picket lines. On November 4, 1939, I was present at the time that the florist truck pulled up and I went to call the captain of police to find out if they could go through the picket line. When I
200 got back the arrest was already made and I don't know anything about it. My organization provided bail for him.

Mr. Goldberg: Just a minute. I move that the question and answer be stricken.

Q. I might say——

Commissioner Gooding: Motion is denied.

Q. Did your organization provide counsel for John Heisdorf?

Mr. Goldberg: I object to that question; it's not material to the issues here.

Commissioner Gooding: Overruled.

Q. Will you please answer?

Mr. Goldberg: If the Board please——

Q. I guess the order's been made. I don't know any reason for argument.

Commissioner Gooding: Go ahead, we will hear you.

(Argument by counsel based upon Section 103.53 Wis. Stats.)

201 Commissioner Gooding: Objection is overruled; witness may answer. What is the last question and answer, please?

We did provide counsel for John Heisdorf because of his arrest for misconduct on November 4, 1939. Our lawyer is counsel for our whole organization. It doesn't make any difference which one is arrested.

202 After this occurrence Mr. Heisdorf did not make any report to me. I did not confer with him as to the facts surrounding his arrest for disorderly conduct. I did not order him back to the picket line, but I know that a day or two after he did go back on the picket line and that he has been there ever since at different occasions. I was not present on November 10, 1939, when Mr.

Heisdorf dumped several cans of cubed ice into the street, but I arrived there later and conferred with Mr. Heisdorf about it.

203 I did not send Mr. Heisdorf back to the picket line after that occasion nor did I object to his being there later.

Charles McLaughlin is a member of our union and has been for six years. He was an assistant business agent in 1938 and during the year 1939 was an assistant to the secretary. Our organization provided bail for Mr. Charles McLaughlin on November 4, 1939, when he was arrested and also provided counsel for him.

204 Our organization paid the fine for McLaughlin when he was arrested for disorderly conduct. I was not present on November 17th, when Charles McLaughlin was again arrested for disorderly conduct at the Plankinton Hotel. I did not send Mr. McLaughlin back to the picket line nor did I see him on the picket line since. He has never been on the picket line since.

205 He was arrested on November 4, 1939, and returned on the picket line and remained on the picket line on November 17, 1939, when he was again arrested. We again bailed him out, provided counsel fees for him and paid his fine. He is still a member of our organization. Neither Mr. McLaughlin nor Mr. Heisdorf are on the membership list for the Plankinton or Kilbourn Hotels.

206 Exhibit No. 14 for identification is a complete list as far as I know of the employees, their addresses and occupations at the Plankinton Hotel as of today. Exhibit No. 15 for identification sets

forth the names and addresses and occupations of all of the employees working at the Kilbourn Hotel as of today, who are members of the union. (Exhibits 14 and 15 offered into evidence. Objection by Mr. Goldberg. Received by Board.)

208 Neither Mr. Heisdorf nor Mr. McLaughlin appears on those lists.

I know James O'Brien. He used to be a mem-
209 ber of our union and is a former prize fighter. I don't know if he lived in Chicago. He did not come up from Chicago with me. He was a member of the union about six months, but has not been for the last two years. I received a report of Mr. O'Brien being arrested at the Plankinton Hotel on November 7, 1939, for striking Paul Ziebell. We did not provide bail or counsel for Mr. O'Brien. He was represented by Mr. Jack Goldberg of the law firm of Padway, Goldberg & Tarrell.

210 Our organization did not pay the fine for Mr. O'Brien. I don't know that Mr. O'Brien returned to the picket line after he was bailed out. I don't know who Mr. O'Brien is.

I don't know Charles Alden. I don't recall his name, but I may know him when I see him. His name appears on Exhibit 14, which means that he is a member of our union.

221 We pay our pickets a certain hourly wage for picketing. The chairman of the picket captains keeps a careful watch and scrutiny of what the organization pays out for picket duty. He checks with the secretary.

I personally did not know that James O'Brien

was ever on the picket line at the Plankinton Hotel.

Charles Alden is still a member of the union, but I was not present when he engaged in a fist fight with Robert Jeske, an employee of the hotel, on November 10, 1939. I got a report of the affair, but I did not know whether a member of the union or not had been engaged in the fight. I don't
212 know whether Charles Alden is now on picket duty.

I don't know Larry McAllen and I don't know if he is a member of the union, but I might know him if I see him. I don't know him by name. I was not present when McAllen was arrested on November 17th for disorderly conduct, and I don't know if the organization provided bail for him. I think Mr. Goldberg's office represented him.

213 Mr. Goldberg's office is our office as far as legal union business is concerned. I do not know whether our organization paid the fine for Mr. McAllen.

Thomas J. O'Mahr belongs to the union, but does not hold any office. He worked at the Plankinton Hotel and was and still is on the picket line. I was not present on November 14th when Mr. O'Mahr was arrested for disorderly conduct for striking and kicking Edward Knopf, but report was made to me about it.

214 We provided bail and counsel for Mr. O'Mahr and paid his fine. He is now back on the picket line.

Mr. Joseph Hofich is a member of our organization and holds the office of outside guard. He also is captain of the pickets at the Plankinton Hotel.

I was not present on November 19, 1939, when Mr. Hofich was arrested by the police for disorderly conduct at the Plankinton Hotel when Rudolph Sciano, a working employee, was struck and injured.

215 I received a report and our organization provided bail for Mr. Hofich and also counsel. We did not pay his fine. He has not been tried yet.

My true name is Phil L. Valley and that always has been my name. I never changed it and was never known as Felix Scalli. I was born in Chicago. I have been with Local 122 for six years.

216 (Charles McLaughlin, called adversely as a witness by counsel for the plaintiff, over objection.)

217 **CHARLES McLAUGHLIN,**

called adversely by the complainant, being first duly sworn, on oath testified as follows:

Adverse Examination, by Mr. Knoeller.

I have no official position with the union. I do not know how long I have been a member, but I am a member today. I have been a member possibly eight years.

218 I was at the Plankinton Hotel on November 4, 1939, when the florist attempted to make a delivery. I was on the picket line off and on from the time the strike was called. I no longer am on that picket line. The last time I was on the picket line was at the time of my last conviction. I provided my own bail on November 4, 1939. The Local Joint Executive Board provided counsel for me.

This Board includes representatives of Local 122. It does not include representatives of the International Laundry Workers Local 174.

219 The Bartenders International League of America, Local No. 64, is represented on the Joint Executive Board. The Milwaukee Building Trades Council is not.

After my arrest and conviction on November 4 I returned to the picket line. I was on the picket line on November 17, when I was again arrested for disorderly conduct with respect to an assault upon Lester Raasch, a bellman. I was found guilty and union counsel was retained for me, but the union did not pay my fine and the
220 union did not provide bail. I have been on the picket line as a representative of the union.

Examination, by Mr. Goldberg.

The first time I was arrested and convicted for disorder on the picket line was when the florist incident occurred. That was when Jack Heisdorf and myself tried to ask the florist delivery boy not to go through the picket line.

Objection was made as to the form of the question and because it was not proper re-
221 direct examination. Objection sustained.

After each of the occurrences I was summoned before the Executive Board, at which was present Mr. Goldberg and Mr. John Alexander, the man in charge of the pickets. I was reprimanded severely for getting into that altercation.

222 When I was summoned before the Board after

my first arrest I was told that the organization did not condone such tactics and, above all, from one of their own representatives, and that they did not want a repetition of it again.

223 **JOHN HEISDORF,**

called as a witness adversely on behalf of the complainant, being first duly sworn, on oath testified as follows:

Examination, by Mr. Knoeller.

My name is John Heisdorf and I live at 1028 North Fifteenth street. I am vice-president of Local 122 and assistant business manager, as well as a union member. I first joined the union about ten years ago.

224 I have been vice-president and assistant business manager since February. My official duties consist of taking care of complaints, signing up new members, checking up hotels and restaurants for the employees and seeing that conditions are maintained. I devote my full time to that work. At places where a strike is called and picketing is done my duties are supervisory. I keep control of the pickets, since somebody has to be at the head to keep control of them. I don't mean violence. I mean that some pickets would leave the line and you wouldn't have any pickets left; somebody has to be there to keep a certain number of pickets on the line. I control the number of pickets on the line and direct the pickets as to their actions in case of doubt.

225 I was arrested for disorderly conduct at the

Plankinton Hotel when a florist attempted to make a delivery of flowers. Bail was not provided by the union. All union members are entitled to defense counsel at any time, and I received my defense counsel from the union. I paid the bail myself. I was fined. I made a report to the union as to what occurred on November 4, 1939. I returned to the picket line the following day. I did not return to the picket line on the same day that I was bailed out.

I did not on November 10, 1939, take hold of certain cans of ice that were to be delivered to the Plankinton House and dumped them into the street. I might have got mixed up in them in the shuffle, but I never tipped them over. Frankly, if Wood would have kept his busboys out, there
226 wouldn't have been any trouble with the cans. I had charge of the pickets on that particular day. I told you on the street about two or three days later the four cans were tipped over. There was no secret about it. Everybody knows four cans were tipped over. It is not necessarily true that our pickets tipped them over. I just made the statement that if Wood's busboys had not tried to carry them and overbalanced themselves they might not have got tipped over. They tried to carry too many cans. I was trying to persuade the driver to take the cans back to the ice company. I had persuaded him to take them back. In fact, he had started to move those cans into his car when about ten busboys came out of the hotel with their shirt sleeves rolled up, no hats or coats on, buzzed through the picket line, knocked

down two of the colored pickets, and before I could get around to the front of the car the rumpus had started. I tried to stop it. I did not lay hands on the busboys at any time.

227 I did not lay hands on the cans at any time. I made a report to the union about that affair. I am not on the picket line now. I have been in my territory for approximately two and a half weeks. I have a lot of work to do in my territory. The Plankinton Hotel and Kilbourn Hotel are in my territory. I do not do any picketing at all. I do not manage any of the pickets at the Plankinton or Kilbourn Hotels since the ice was tipped over.

228 **Cross-Examination**, by Mr. Goldberg.

The two colored members who were tipped over and pushed down by the bus boys were girls. I was fined $5.00 and costs, but the Judge saw my record and said he would suspend my sentence and put me on thirty days probation. I have never before been in any trouble. As a result of being arrested, I was asked to appear before the union executive board. Mr. Goldberg was also present. I was told to be peaceful on the picket line and not to do anything that could be construed as causing a violation of law, that the organization would not stand for it, and they did not want to give the hotels any "out," that I was to be instructed to keep picketing peaceful and not get myself in any kind of a jam. Neither the executive board nor our attorney said that I did the proper thing at that time.

229 They told me that my actions were wrong, that

I should stay far enough away that I wouldn't have got into the jam.

Adverse Examination, by Mr. Knoeller.

My case was adjourned until December 18, 1939, subject to dismissal or suspension if I didn't appear in court in thirty days. My bail has been refunded.

JOHN ALEXANDER,

called adversely as a witness on behalf of the complainant, having been first duly sworn, on oath testified as follows:

Adverse Examination, by Mr. Knoeller.

My official capacity with Local 122 is chairman of the grievance and complaints department, that is, grievances of the people against chiseling employers.

230 At the present time I am chairman of the strike committee, with respect to the strike that is now in progress at the Hotel Plankinton and Hotel Kilbourne and the Hotel Wisconsin. My duties as chairman of the strike committee are to see to it that there are pickets all the time, twenty-four hours of the time, day and night, at these three hotels, also four times within each twenty-four hours four different shifts of pickets. I give them instructions as to how to behave on the picket lines. I also appointed officials of the union, men preferably, as head of each picket line at each time. I occasionally visit the various picket lines to see how they are progressing with their work. I must, because I preach to them that at all times

peace must be maintained, and I occasionally visit the picket lines to see to it that peace is maintained at all times.

"Hire" is not the proper term for getting the pickets to go on the line. Primarily the pickets are strikers, members of Local 122, and members of all the other unions involved in this strike. I must check up on those pickets that come from other unions, and occasionally members of the American Federation of Labor that may come to give their moral support occasionally. It is my business to see to it that they are legitimate members of the American Federation of Labor, and also instruct them as to how to behave on the picket
231 line, because in our opinion public opinion with us means everything. I wouldn't say that I select them or train them. I am not a general training an army. I can't show anyone how to walk, or it doesn't take brains to know how to carry a sign. I am not getting smart; I am trying to answer your questions the way you put them to me. I instruct the pickets how to act on the picket line. I tell them where to perform the picket duty. I visit the picket line from time to time to see how they are getting along. I absolutely did not select James O'Brien to do picket duty at the Plankinton Hotel.

232 I did pay O'Brien on one occasion on picket duty. I sent Charles A. McLaughlin to supervise the pickets at the Plankinton Hotel and to see to it that peace is maintained. These were my instructions to Brother McLaughlin. I also directed Thomas O'Mahr to perform picket duty at the hotels. I instructed them how to act. I

also instructed Larry McAllen and Joseph Hofich how to act on the picket line. Not all of these same parties are still doing picket duty on the picket lines. For instance, I forbidded Pat O'Brien to show his face again on the picket line.

233 I forbidded Brother McLaughlin to show his face on the picket line again. I had reprimanded the others very severely and told them they would not go again on the picket line if anything happened, even though they might be innocent. I didn't want them mixed up in any fear whatever. Outside of Mr. McLaughlin and Mr. O'Brien the others are still being directed by me to do picket duty at the Plankinton and Kilbourn Hotels. Mr. Heisdorf doesn't do any more picket duty, nor does McAllen, nor does O'Brien. Joseph Hofich occasionally does do picket duty. He stays a few minutes at each time, but he doesn't stay on the picket line. He supervises.

234 I know that several of the pickets whom I have mentioned have been arrested for disorderly conduct on the picket line. I have been in court all this afternoon while testimony was taken in that respect. These pickets are still members in good standing today. Jack Heisdorf, Charles McLaughlin, McAllen, Joseph Hofrich and Thomas O'Mahr are all members in good standing.

235 **Cross-Examination**, by Mr. Goldberg.

I did not send O'Brien on the picket line. He came up to me and asked me if I was chairman of the strike committee and if I had authority to

pay pickets. I told him I did. He said he had been picketing. I told him that I didn't know him; that I had to check up on him and see who he was before I could consider him a picket. I found out that he was a member of our local before, but he wasn't a member then, and told him he couldn't go on the picket line any more. I paid him off then and there, and since that time I know O'Brien has not been on the picket line. I saw to it. He went on the picket line in the first instance absolutely on his own volition. He knew there was a strike, so he went to the picket line and wanted me to pay him for the hours he put in. I paid him off and told him to stay away. We went along with the members of the American Federation of Labor, especially with the unions involved. I did not pay Mr. O'Brien several times before he was discharged from the picket line.

236 I did not know that he was performing picket duty before he was arrested and convicted on November 7, 1939. I found out later. He had never reported to me as chairman of the strike committee. I made it a point with everyone on the picket line that unless they registered with me, with the department, with the strike committee, they had no money coming, and nothing would be given to them. That is why I paid him once and then fired him. Although I am not a member of the executive board, I attended executive board meetings as chairman of the strike committee, where I had to give reports to the
237 executive board as to what was what on the

picket line. At these executive board meetings, particularly in the case of Brother McLaughlin, I stressed and emphasized the fact that under no circumstances can we allow any violence on the picket line, even though our people were provoked time and time again. I explained that as long as public opinion is with us we had a good chance of winning, and, therefore, I advised Brother McLaughlin and everyone else present to co-operate to the best of their ability to see to it that peaceful picketing was maintained. I also was pretty "hot" that day, and I told members of the executive board that I would prefer charges against anyone who may be the cause of further violence on the picket line and demand his expulsion from the International.

At these meetings Chuck McLaughlin was reprimanded by the president of the executive board and every member that was present, to the best of my memory, because of his arrest on two separate occasions. Also, he explained that he
238 didn't hit anybody, and that the whole thing was a misundertanding of some imaginative people. We felt, inasmuch as he was in some kind of a fight, he had to do his utmost and stay away from any kind of a fight.

The same thing happened in the cases of Jack Heisdorf and Joe Hofich.

239 **WILLIAM KOMES,**

called as a witness on behalf of the complainant, having been first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Knoeller.

My name is William Komes. I am head waiter at the Plankinton Hotel and was on November 4, 1939.

240 On that day at about 3 o'clock in the afternoon August F. Kellner, florist, tried to make a delivery. I was asked to unlock the door in the sky room, which I did. When I got there to unlock the door, five or six men ran from across the street to where I was standing. One of the men called the other pickets who were picketing at the main door, and they all started to picket. As I tried to open the door to let one of the men in, who was going to do the decorating, they shoved the door in my face. I stepped back and knocked a screen over. Then when I saw what had happened I went to the door again and opened it about two feet, I imagine, and was going to let one of them in. They had some decorations in their hands. The pickets went to work and took it out of their hands, trampled on it and pushed the fellow aside. I think there were five or six pickets that ran across from the filling station and were there at that time. The sky room is a first floor dining room at the hotel, having a Michigan street entrance. The delivery men were bringing in some decorations, I think it was bitter sweet they had in their hands, which was

knocked out of their hands and trampled on. The fellows were shoved aside. The policemen came and they restored the picket line, that is,
241 restored peace. The fellows came in and done their decorating and brought in their decorations. The pickets pulled the decorations out of their hands and trampled on them. They were damaged beyond repair and didn't bring any of them in. When I attempted to open the door, the pickets called me scab and everything like that. I don't remember all that was said, there was so much said. They did not threaten me at all.

Cross-Examination, by Mr. Goldberg.

I am not a member of the union. I don't have a hiring and firing capacity, just head waiter. As such, I am not eligible to union membership. I have been working in the Plankington House this past year and although they have a closed shop contract, I was not required to join the union. I had been there during the entire strike.
242 During all the time of the strike, which has just completed its first month, there were pickets there twenty-four hours a day. They paraded around three different entrances. I have gone in and out of the hotel and no one has stopped me from coming in and out. They have threatened me, called me scab and have said that I had better look out or they would get me. Nobody assaulted me and there were policemen there all the time.
243 I don't know how many disturbances there had been during the thirty or thirty-one days of strik-

ing. The police department was there at all times. I did not throw a can of tomatoes out of the window at the pickets, nor did I know that that happened. I did not throw any water while the pickets were picketing.

244 I don't know who did nor do I know that happened.

The men from the florist were trying to deliver some decorations for the florists' convention. I don't know that the pickets asked him not to go through the picket line.

245 **JOSEPH MUELLER,**

called as a witness on behalf of the complainant, being first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Knoeller.

I am a florist decorator for the August F. Kellner Company. On November 4, 1939, I tried to make a delivery at the Plankington Hotel at about 3 o'clock in the afternoon. When I tried to deliver the decorations, the policemen formed a line that I was supposed to walk in back of. While I was walking one of pickets threw a fist at me and the other one knocked the bittersweet out of my hand. It was crushed by the whole mob walking over it, as well as the police. There were about fifteen pickets there at the time. They
246 did not say anything to me. The two pickets who were involved were Charles McLaughlin and John Heisdorf. They did not hit me, although they did swing at me. They destroyed the deco-

rations. After that the pickets went away, more police arrived and we kept on working. We picked up the decorations but it wasn't any good any more.

247 **Cross-Examination**, by Mr. Goldberg.

The pickets didn't hit me, the policemen grabbed them. When we pulled up, the pickets had told us that we shouldn't go in because they had a dispute with the boss and they tried to talk us out of making delivery. I called my boss and he told me to go ahead and deliver it. I don't know whether the police department stepped on the stuff or not. There was a wrangle. I wouldn't blame anybody for it. When the police tried to protect us, they swung at me but did not hit me.

248 It is not true that in the District Court I did not know who it was who swung at me.

PEGGY HEHMEYER,

called as a witness on behalf of the complainant, having been first duly sworn, on oath testified as follows:

Direct Examination.

My name is Peggy Hehmeyer. I work at the hotel as head waitress and banquet manager. On November 4, 1939, at 3 o'clock in the afternoon, when the florist company came to deliver the decorations for the convention, I went to the door to assist them.

249 Mr. Komes stood at the door when one of the pickets came and slammed the door in his face.

Mr. Komes fell back against the screen and knocked the screen over. There were fifteen or twenty pickets there and I was told that I would never get another job in this town. I would recogniże the two people that made this remark to me, but I did not recognize Mr. Heisdorf or Mr. McLaughlin as being present at that time. I could see through the window of the door that the floral decorations were knocked from the florist boy's hand and trampled upon by one of the pickets. The only threat made was by one of the men, who was a stranger to me, and who remarked that he would get me, or I would not get another job. He was a picket.

I was present on November 10, 1939, when an attempt was made to deliver ice cubes at the hotel at about noon or shortly before of that day. I saw one can of ice come in, so went to the door to see the rest of them.

250 I noticed there were a great many strangers around and there was some commotion going on, so I called two or three or four or five boys to assist me with the ice. The ice came in large new garbage containers in cube form. They were galvanized cans about four feet high and twenty-seven or thirty inches in circumference. I think five or six cans had been ordered for delivery. My ys came out in their uniforms, because they didn't have time to get into street clothes to see what they could do in bringing in the ice. I came out just in time to see Mr. Alden struggling with our boy, Bob Jeske. He was pounding him about the head. Bod didn't even strike back, as far as

I could see, but he had to drop the can which he held under his arm. They were trying to unload the other cans of ice from the rear compartment of the car when I saw Mr. Heisdorf struggling with one of my boys and stopping him. The boys
251 couldn't bring the ice in, because it was too much to contend with. I saw Mr. Heisdorf pull the cans of ice out of the arms of the other boys and dump it on the street. All the other four or five cans of ice were tipped into the street and left there. We were only fortunate in getting one can in.

Cross-Examination, by Mr. Goldberg.

When I said that I believed Mr. Heisdorf tipped the can I should have said that I did know, I am positive he did. Ten or twelve of my boys ran out to bring the ice in.

252 I did not see a couple of colored girls laying on the sidewalk or roadway. I didn't see the busboys throw the girls down. I don't know how many pickets were on the line that day. There were so many people out there all around this automobile and all around these ice cans and I couldn't say who were pickets and who weren't. I know there weren't more than perhaps ten of our own employees out there. I didn't recognize the others.

The ice was delivered in a car which was parked at the curb in front of our hotel on Michigan
253 street near the Michigan street main entrance close to the telegraph office. Looking out from the inside of the hotel it was parked to the left of the entrance. I was in the hotel, but ran out into

the street. I saw the beginning of the commotion, but did not see two girls knocked down. Around this automobile there were the pickets and ten or twelve of my boys.

254 I was right in back of Mr. Alden. I don't believe there were ten busboys. There were only about five or six. The street was pretty crowded. I was off to one side, but in plain vision of the cans and watching Mr. Alden at the same time. In spite of the crowd around there, there was a big opening so that I could see what was going on inside. Alden was off to the right of the automobile. He was in the street, at th front of
255 the auto, and I was right behind him. The cans were being unloaded at the rear. I was able to see Heisdorf, because I was practically in the middle of the street.

The florist situation took place at the entrance of the sky room on Michigan street. The door opens outward.

256 It is a clear pane glass having little frames. Mr. Komes was standing on one side of the door and I was right aside of him. I was in the lobby of the sky room. There are two sets of doors and I was standing between the outside door and the inside door. Mr. Komes was to my left. That is my
257 east. The doorway itself is in the south part of the building and opens south. He opened the door; I think I assisted him. We were both facing south when someone slammed the door shut. I am sure it was not a policeman. I was able to see
258 who it was, because I was facing south. The door is practically on the sidewalk line. I would recognize the man who slammed the door if I saw him.

He was a stranger to me. I don't know whether in slamming that door open either I or Mr. Komes hit this fellow who was passing by on the street.

I am in charge of the girls working in the dining room. They originally did not belong to the union.

259 Before our hotel signed up with the union I may have repeatedly expressed myself as being opposed to the union. I did not tell the girls that they did have to join the union on the 1937-1938 contract, nor did I express opinions at that time that I did not want them to join. I said that belonging to the union wasn't part of my policy, or part of the principle that I stand for. I did not forbid the girls to post notices in their dressing room.

260 I know Helen Martel. I don't know anything about a notice which she posted in the girls' dressing room concerning a special union meeting in 1939. I did not see any meeting notice. I heard there was a notice there and I did make inquiry, naturally, who posted it, because I was interested. I thought perhaps it was just something that wasn't official and I thought I had a right to know whether there was a notice there or not. That is the only reason I inquired. The girl did leave her employment shortly thereafter, but I did not make things miserable for her because she posted this
261 notice. She worked five or six hours a day and then told me she didn't want to work more than two hours a day. We have some girls who work short hours and some girls who work long hours, depending on their ability. I put the girls on the shift, but I never have discriminated with girls

because of belonging to the union or being active in the union. I don't know why Helen quit.

262 I did not tell the girls after the modified closed shop contract was signed in 1937 that they did not have to join the union. It is not true that at that time the girls got a raise and were told they didn't have to join the union. I was not present nor do I know that Mr. Wood addressed the girls and told them that they did not have to join the union under the contract that was signed.

263 I don't remember saying on the day that the strike was called to somebody in the kitchen, "When are you Communists going out on strike?" I know Fred Brant, but I don't recall whether I had any conversations with him that day. I don't remember making such statement.

264 I have never referred to the union employees there as Communists or the striking employees. When the arbitration award came down I attended a meeting in room 212, which was called by Mr. Wood.

265 Mr. Wood told the members at that time that the arbitration board had made a decision, which he was willing to accept. I was in the room when you called Mr. Wood to ask whether he had mailed the contract, and he said, "Yes, it's in the mail signed." He told the employees that the new contract was handed down by the arbitration board, that it was the same thing as the Supreme Court Judge said and must stand. He said the contract wasn't anything that either the union or the hotels could say was their own contract, because it was decided by the arbitration board. He picked two or three other girls to call the

members in there and then asked me to assist them. I told only two or three people. I didn't know why he was calling the meeting. He didn't speak to the employees about the arbitration award. He said that the new contract was there and that it was signed.

266 He didn't tell the employees that he had tried to be a good boss. He didn't try to tell him why he thought the union refused to accept the contract. I don't remember anything else he said besides what I have already testified to. I don't remember him making any statement that he didn't know why he had to sign since he was already living up to the things the union wanted. I believe the question was brought up at this meeting about the union black-balling any member who did not go on strike. I don't believe I made any answer to it or any statement about that. I did not tell the employees that I did not believe the union would do such a thing.

267 I believe my reason for not wanting the employees to belong to the union is a personal reason. Unionism never seemed a part of my make-up. It just wasn't part of my principle. I was not opposed to it very badly nor was I for it very much. I was sort of neutral because I didn't understand unionism very well; I didn't talk unionism with my girls very much since our 268 contract has been signed and not since we entered into unionism. I don't believe I have discussed unionism at any time during the past year nor have I made any statements derogatory to the union.

I have charge of hiring and firing the girls in

the dining rooms, but am too busy to talk about anything but business around the hotel. It is not my business at the hotel to talk against the union. I have not discussed with Mr. Wood the attitude of the Plankinton House Company on unionism. I have called some of the girls over the phone since the strike began and asked them to come
269 back to work if they liked. I did not tell them that they would have jobs for life or that we would protect them, and that the union couldn't do anything about it. I was not present when Mr. Wood made any such statements.
270 I don't know which girls went and which girls didn't go to union meetings, so did not check on them because they attended meetings. I never made any statements derogatory to Phil Valley as business agent of the union.

When I phoned these waitresses to have them come back I didn't ask them to come back, but asked them if they wanted to come back. I did not refer to the union in those telephone conversations.

271 I never told any employee that the company was going to organize its own union, nor did I hear Wood tell that to anybody. I never told anybody about two weeks before this hearing that the hotel was going to file an injunction to protect those who were working. I may have promised the waitresses that if they wanted to have protection against pickets and the strangers on the street we would give them a place to stay. The day before the strike I gave a waitress by the name of Tess a vacation. I gave her a vacation to reprimand her and for her to think over

her conduct. I called her back before the thirty days were up.

272 A week ago Sunday we had a very fine turkey dinner at the hotel for all of the employees inside the house, at which Mr. Wood was present.

273 Mr. and Mrs. Hoffman were also present. Mr. Hoffman is the resident manager, while Mr. Wood is the general manager. The officers of the so-called independent union were also there. There were no speeches. We gave a few cheers and had a very fine dinner. We did a lot of joking and a lot of laughing and perhaps sang a song and had our picture taken.

274 The hotel never gave a party before for the employees because we were in operation and it was impossible to give a big party like that before. That was the only opportunity we had to get together at a party. I am not a member of the independent union nor have I signed any application blank. I have not asked my waitresses to join nor have I discussed the union with any of the employees. I still am opposed to unionism.

275 **ROBERT JESKE,**

called as a witness on behalf of the complai ant, having been first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Knoeller.

I am a steward's assistant at the Plankinton Hotel and was such on November 10, 1939. At about noon of that day Mrs. Hehmeyer instructed us to go out and help get the ice in, because there were a large number of pickets out there.

We went out and I grabbed the bucket of ice with the assistance of another fellow.

276 When I came around to the ice car, Charles Alden, former doorman at the hotel, struck me in the face without saying anything. I didn't say anything to him, nor did I push him. He had been in the picket line. He struck me three or four times with his clenched fist in the face. I set the ice down, and when I later came to take it up again I found it had been dumped. I saw Jack Heisdorf on the picket line after the fight.

Cross-Examination, by Mr. Goldberg.

277 This was a regular automobile with a rear compartment in it. It had a large trunk in the rear, out of which I took the ice. I walked toward the front of the car on the street side. The altercation took place in the gutter, about a foot and a half from the curbstone, but right next to the front of the automobile. Alden was about a foot and a half from the curb and road.

278 Mrs. Hehmeyer was not in back of him when it started, but later she was in back of him.

WAYNE BANNING,

called as a witness on behalf of the complainant, having been first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Knoeller.

I am a bartender at the Plankinton Hotel. On November 10, 1939, I went out to help bring in the ice.

279 One of the fellows who was going to help me with the can couldn't get near enough to me. In the meantime the can had been banged around and part of its contents spilled so that I could carry it. In picking it up it was upset. When I tried to scoop part of it back into the can it was again upset. Heisdorf is the gentleman who upset the can. I don't know who dumped the can the first time. Mr. Heisdorf dumped it the second time. There were twenty-five or thirty people around there, but I don't know how many of them were pickets. I saw Charles Alden strike Robert Jeske more than one blow. I saw him
280 strike three blows. He had his arm around Jeske's neck and was poking him in the ribs.

Cross-Examination, by Mr. Goldberg.

When I saw the altercation between Jeske and Alden, Alden was leaning up against the left front fender of the automobile. I don't know if I saw the whole transaction. I don't know where it started. There were no arrests made at that
281 time, that I know of. I have been working at the hotel since July as an apprentice. I don't know if I am considered as a bartender as yet. I work back of the bar and assist in serving drinks. I
282 mix drinks also, and have a license as a bartender from the City of Milwaukee. I applied for my job to Mr. Wood. At first I assisted on the parking lot at different times, and the rest of the time I was a bartender. I went behind the bar in July, when I was first hired. I was not asked whether I was a member of the Bartenders' Union.

283 Mr. Wood did not ask me to join the Bartenders' Union in order to work there.

284 I live at 2518A West Michigan, and I lived in Milwaukee since 1931, but not regularly. I have lived here steady for the last two years and never worked at the hotel before.

286– (By stipulation and consent of the parties, the
288 following exhibits were offered and received:

Exhibit No. 16, being the 1938 proposed revision of the 1937 labor contracts.

Exhibit No. 17, being the original 1937 labor contract between the complainant and the respondent union.

Exhibit No. 18, being the minutes of the meeting of the four arbitrators on or about June 16, 1938.

Exhibit No. 19, transcript of testimony taken before the Board of Arbitration.)

288 **CHARLES COBEEN,**

called as a witness on behalf of the complainant, having been first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Knoeller.

I am the manager of the Students' Union at Marquette University. One of my duties is the handling of student employment.

On or about November 8, 1939, Mr. Valley called me on the telephone with respect to the students who were working part time for their meals at the Plankinton Hotel. He stated they were working since the strike had started and that the

union would have to insist that the University withdraw them from the Plankinton Hotel. He gave as his reason the fact that the students were aiding and helping the hotel by continuing to work there after the strike had started. At that time I had no definite knowledge of the individual students working there—most of them having secured their jobs on their own initiative.

289 I told Mr. Valley I would check on the situation. He stated that the students working there would have to be withdrawn or the union would be forced to stop all students working at other hotels and restaurants belonging to the union, which would throw several hundred students out of part-time work for their meals. He stated that this was not a threat, that the union had every intention of following through and carrying out this statement. I told Mr. Valley that the students had secured some of these jobs on their own initiative, and that the University as a rule did not try to interfere with any part-time work the students were doing unless it was in a place that was immoral or for some reason of that character. He stated that, regardless of this fact, at a meeting of the previous evening the union had insisted upon this point. I told him I would call him back after checking up the matter.

I talked to Father McCarthy, the president of the University, and acquainted him with the facts. Shortly thereafter two men came from the union to talk the situation over in person. Mr. Valley had told me that he would send somebody up to my office. They came about an hour later.

290 They restated the situation and said that the

students by working there were a bad influence on the employees of the Plankington who were on strike, and that the University should co-operate with the union in this respect. I again talked with Father McCarthy and told him that it would affect a large number of students who were dependent on these meal jobs as a means of staying in school, and that the union demanded immediate action. We were given until that evening to agree to remove the students from the Plankington. Father McCarthy asked me to contact the students working there, to find out how they felt about it and to put the point to them that their continued working there would jeopardize the jobs of the other students. He further stated that since it would be a burden on the students to give up these meal jobs we should feed the students until the strike was over, that is, feed those students working at the Plankington that would los their jobs.

I then contacted several of the students, put the proposition to them, and at least one of the boys went over to talk to Father McCarthy personally, because he did not wish to give up the job, stating that Mr. Wood treated him very fine and that there was no point at issue as far as he was concerned; that he was simply working for his meals and wanted to continue to do so. When I told him that it would throw the other students out of work he said he would then stop working. The other students stopped for the same reason, not wishing to feel that the responsibility for throwing a number of students out of work was partially on their shoulders.

That afternoon I spoke to Mr. Valley and related to him that we had contacted the students
291 and that they would stop working. I asked him if there was anything further that we needed to do since we did not want any trouble as far as the students working in other hotels and restaurants. He said as long as the students did not work that would be satisfactory to the union. To date the students are still out of work as far as the Hotel Plankington is concerned. There are possibly several hundred students in the city, whose jobs would be jeopardized if the students at the Hotel Plankington did not withdraw. If practically all of the hotels and restaurants are union, then a larger number would be involved. I tried to reach the managers of several other restaurants to find out what would happen if we would not withdraw our students from the Plankington Hotel. I later talked to one of them, who said they would not care to have trouble with the union over such a situation and would be forced to let the students go rather than to make a stand on the proposition. This was after we had got the students to withdraw.

We have engineering students who continue their studies under the co-operative plan. They work one month in a plant and one month in school.

292 These students also work in union shops. It was the feeling of the University that they were forced to comply with the union request in order not to jeopardize the jobs of the greater number of students. We felt we were being forced to take this action although the University pre-

ferred not to be a party in any way to the strike or have any part in it. It preferred that since the students were performing this work as individuals and although it is true that they probably would not have a job if they were not Marquette University students since the jobs are part time, we still felt that we should not be forced to force them to leave these jobs if they see fit to continue them.

Cross-Examination, by Mr. Goldberg.

293 I knew that the union had a closed shop contract with the hotel, and I received information later by hearsay that the union permitted these boys to work without belonging to the union, and without paying any dues because it was the recommendation of Mr. Goldberg, a Marquette graduate, and the attorney for the unions. I knew that the union did this to help the several hundred students going through school.

294 The university would have preferred if the boys had settled the question direct with the union rather than bring the university into the picture at all. I have never given a great deal of thought to the point whether or not the union is justified on the basis of fair play to have the three boys stop fighting the union in order to continue giving this special privilege to the Marquette students. We have had students working in these restaurants long before there were unions and have continued to work in the various hotels and restaurants for twenty years. They were there before the unions and while the unions were or-

ganizing and are still doing the jobs they did years ago since the unions have been organized. They are simply working for their meals. I don't see anything wrong in their employment there. I think it would be an injustice to have these boys join a union to be able to work there, because they work two or three hours a day and simply get their meals out of it.

295 **KARL WERWATH,**

called as a witness on behalf of the complainant, being first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Knoeller.

I am Registrar of the Milwaukee School of Engineering. On or about November 8, 1939, I had a conversation with Phil Valley or some other representative of Local 122.

(At this point Mr. Goldberg offered to stipulate that substantially the same situation exists with regard to the School of Engineering as does with regard to Marquette University in so far as student employment is concerned.)

296 I spoke to Mr. Valley because we were given instructions to see to it that certain of the boys who were working at the Plankinton Hotel would not report back to work. We were given those instructions by a young man who did not identify himself, but stated from what organization he came. He said there were two boys whose names he had that were students at our college who had been working at the Plankinton Hotel. He gave us a dead line as to when these boys would have

to start working. After the conference with the president of the college and myself, I walked out with this young man and wanted to write a report back to the president's office as we do in most any question that comes up pertaining to any particular student. I asked him by what authority he was requesting us to do this and by what authority I could go to these boys, as registrar of the college, and ask them to quit work so forcibly that they would quit work. He said that those were instructions. I asked him to have those instructions written on a paper in the office before 5 o'clock, which was the closing time, so that I could do something about it. Instructions did not
297 come, so I called Mr. Valley. Mr. Valley reiterated the same definite statement as was made by the young man, and further stated that these boys by not stopping working would probably jeopardize their future opportunity for work in any situation where a union might be in control of that work. He said that if these two students would not stop work at the Plankinton Hotel students working in other hotels and restaurants would also be asked to leave their jobs. It is rather hard to say how many other students that would affect since there were certain agreements at these hotels under union contract where students are allowed to work by permission of the union, but not all of the places where these boys worked are places where there are union contracts.

298 There are about 200 students working in hotels in the city.

Cross-Examination, by Mr. Goldberg.

I understand that it is true in a large percentage of cases that the union has a closed shop contract at the hotels in the city which would not permit the students to work at the Plankinton unless they were union members. I know that this privilege has been extended to the School of Engineering and the Marquette University, the Normal School and the Wisconsin Extension to aid the boys and to permit them to go to school.

SAM B. TRAISMAN,

called as a witness on behalf of the complainant, having been first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Knoeller.

I am president of the Business Institute of Milwaukee on the mezzanine floor of the Hotel Plankinton. We have class rooms on the third floor.

299 We have about nine rooms altogether, two of which are on the third floor.

On or about November 13th, I had a telephone conversation with Mr. Goldberg, the attorney for the union. He identified himself and stated that one of the stenographers working in his office who was a student of school could not come to the school any more because she belonged to the union and could not go through the picket line. I stated that I was sorry to hear that, but that I would be glad to send an instructor to her home or to her office to give her whatever instructions she needed.

Mr. Goldberg then said we should do the union a favor by moving out of the Plankinton Hotel. I stated that would be impossible because we had a lease. Mr. Goldberg said to break the lease and that there wasn't a court in town that would sustain the hotel under the conditions. I told Mr. Goldberg that we couldn't think of doing anything like that because it was impracticable and not feasible. Mr. Goldberg agreed by saying that it might be impracticable but he felt we should do it anyway. I didn't mention this to anybody since I intended to forget about it, but
300 the next day the hissing and booing and the insults by the pickets thrown at our teachers during the noon hour when they went out to lunch were so bad that they all came to me about it. Some of the younger students, 17 or 18 years, were booed and hissed for what I don't know. They are students at the school and we have nothing to do with the issues of this strike.

We sustained an inconvenience when a "stink bomb" was thrown in the hotel by somebody on the third floor on a Sunday. The following two or three days the odor that penetrated from the acid in that thing was such that quite a few of our students were nauseated to their stomachs and had to go home.

301 **Cross-Examination**, by Mr. Goldberg.

When you spoke to me, Mr. Goldberg, you told me she couldn't come to class because she couldn't come through the picket line. You also told me that as a member of the Office Workers' Union

she could not go through the picket line. You told me that by continuing on as a tenant we we in effect fighting the union and helping the Plankinton cause. I didn't believe it. You told me that the union would appreciate it if I would move from the Plankinton to some place where there was no union trouble. I then told you that I had a lease.

302 You told me there was legal cause for breaking the lease where you couldn't get your services and your students couldn't get into class because of a strike. I told you that one of the reasons why I didn't want to move was because I was just trying to get established and couldn't afford to spend $10,000.00 to furnish a place and move.

303 When you spoke to me you asked me not to help the hotel cause and defeat the union cause.

Redirect Examination, by Mr. Knoeller.

I wanted to say that I told Mr. Goldberg that we did not care to become involved in the issues of this strike, that we had nothing to do with it. We were running a school, trying to mind our own business.

304 Question by Commissioner Gooding:

The conversations with Mr. Goldberg took place about the 13th of November. Up to that week there had been no hissing or booing at either myself, my students or teachers, but then it was pretty terrible. There had been none prior to the time that Mr. Goldberg talked to me.

Recross-Examination, by Mr. Goldberg.

I was present when the hissing took place.

305 All of my teachers tell me they were hissed and booed plenty. There was nothing like that going on in the first week, but ever since it has been pretty bad. Since the first week I was hissed and I was booed, and a lot of nasty remarks were made. After the first week I am very positive there was hissing. If there was any during the first week I didn't see it or hear it.

Mr. Goldberg: Now, I want the record to show clearly that this time the strike was called November 2nd, and the first week after November 2nd is November 9th, starting November 9th. And I also want the record to be clear at this time that there is no record made of my conversation with Mr. Traisman and a report thereof to the union. Now, the reason I state that, I resent somewhat

306 the inference of the Board in asking about the booing after my conversation, which might raise any implication. There is no such — there shouldn't be any inference or implication.

Mr. Knoeller: Mr. Addis—shall I call my next witness?

Commissioner Gooding: Yes.

CHARLES ADDIS,

called as a witness on behalf of the complainant, having been first duly sworn, testified as follows:

Direct Examination, by Mr. Knoeller.

I am a busboy at the Plankinton Hotel. I was present on November 10, 1939, when the hotel had

difficulty in bringing in an ice delivery. At about noon I was requested by Mrs. Hehmeyer to see if I would help the boys to bring some ice in the Michigan street entrance of the Plankinton Hotel. As the boys gathered together and went out there was an awful crowd around the car, and we walked around to the back of the car and from the rear compartment we took these containers out, which was full of cubed ice, and as I pulled one out Jack Heisdorf grabbed ahold of the handle and yanked it out of my hand and spilled the contents over the street, and I immediately went for another can, and he did the same thing to that one, and we just couldn't get any ice in because they spilled every bit that was in there, every can that we pulled out. The delivery men carried in one can of ice before I was out there.

307 Mr. Heisdorf when he grabbed the cans said to me that he thought I was going to stay home and told me that I had better stay in the hotel.

Cross-Examination, by Mr. Goldberg.

I have worked at the hotel about a year and four months. I never belonged to the union. Three days before the strike occurred I was up to the union office and was going to join. Mr. Heisdorf made me go up there because he asked me why I don't belong to the union during the preceding time. I was told by Mrs. Hehmeyer that I must belong to the union and went up to join about three days after she told me.

308 I was a student for a while and did not have to belong to the union. I have been working full

time about a half a year. During that half year I never knew much about the union and didn't know whether we had to belong or anything. No one has told me when I went on full time work that I had to belong to the union.

309 Miss Hehmeyer did tell me to go up to the union at about the time I went up there. I did not graduate, I did not finish school, and I left school in 1938 and have been working at the Plankinton since the fall of 1938, while I was a student at Marquette.

310 **GERALD KLIMEK,**

called as a witness on behalf of the complainant, having been first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Knoeller.

I am a busboy at the Plankinton Hotel. On November 10, 1939, I was one of the boys who went out of the hotel to bring in some ice. I saw Jack Heisdorf at the rear of the car. He was holding back some cans that Jack Addis tried to get out of the rear of the car. I did not notice what happened to the contents of the can.

311 I saw Mr. Heisdorf lay his hands on the cans that Mr. Addis was carrying. I saw Charles Alden have a fight with Mr. Jeske and saw Mr. Alden strike five of six blows in the head and in the chest with a clenched fist.

Cross-Examination, by Mr. Goldberg.

I am single and live at 503 East Juneau avenue and have worked as a busboy since October 2nd at the Plankinton Hotel.

312 During the first four weeks I did not work full time. I am not a student. I am 21 years old. I was hired by Miss Hehmeyer. She did not tell me to belong to the union until Mr. Heisdorf came over and saw me at the hotel during the latter part of the month of October. I heard others tell me that the union would be calling on me to join. Miss Hehmeyer told me about five days before
313 Mr. Heisdorf found me working there. Maybe it was five, six, seven or eight days before; I can't give you the exact date. I don't know when Jack Heisdorf spoke to me. I was in the hotel when Miss Hehmeyer told me to join the union.

314 We were in the coffee shop. She came up and told me I would have to join the union. I was
315 all by myself at that time. This took place about noon. I was hired originally by Miss Hehmeyer. She did not ask me if I was a member of the union and she didn't tell me at that time that I would have to join the union. I don't know whether I took anyone's place when I was hired. I was hired on October 2 or 3. I went in and applied for the job. There was no ad in the paper.
316 Nobody told me there was an opening. I went in myself. This was the first hotel that I had applied to for a job. I asked for Miss Hehmeyer. I asked for who hired the help.

(Discussion between Commissioner Gooding and Attorneys Knoeller and Goldberg with respect to materiality of question relating to witness' prior employment. Objection by Mr. Knoeller to this line of questioning sustained at page 318.)

318 My regular employment is a busboy. I was

never one before. I was a member of a C. C. Camp.

Q. How come you applied for a busboy's job?

319 A. Well, that——

Mr. Knoeller: That's objected to as irrelevant, incompetent and immaterial.

Commissioner Gooding: Sustained. And what is the objection?

The Reporter: "That's objected to as irrelevant, incompetent and immaterial."

Mr. Goldberg: We take exception.

I first spoke to one of the girls in the coffee shop before I spoke to Miss Hehmeyer. I was one of the fellows who came out to get the ice in. There were about three or four others besides myself. I heard Miss Hehmeyer testify that there

320 six or seven. I don't know the exact number. There would be five or six of us. There were a lot of people on the street and there was a large crowd around the automobile. I came out on the Michigan street side through the lobby door. I didn't run; I walked.

321 Some of the other fellows were at the rear of the automobile when I come. I followed Charles Addis. We walked right through; we didn't have to push at all. The crowd permitted us to walk through. There was pushing around the rear of the car. There was a mob there.

322 I walked out through the entrance, faced the car, walked around on my right-hand side of the car at the front end. I didn't see anything at the front end. I did not see Mr. Jeske and Mr. Alden fighting then. I saw them when I returned.

After I saw that there wasn't anything to do with trying to get the ice out of the rear of the car, I saw Alden and Jeske when I started to walk back. When I passed the front of the car for the first time I don't know where they were.

322 While I was walking towards the rear of the car I saw Mr. Jeske dragging a can of ice into the hotel.

323 Commissioner Gooding (Q.): Did you see Jeske carrying a can, or didn't you?

A. No.

Mr. Goldberg: That's all.

Redirect Examination, by Mr. Knoeller.

Q. Did you see Mr. Jeske dragging a can?

A. Yes.

Mr. Goldberg: Just a minute. Just a minute. Mr. Valley just says that as I was asking questions of this man this Mr. Charlie Addis was indicating answers to this witness.

Mr. Knoeller: I will put Mr. Addis on the stand and take care of that. That's all, Mr. Klimek. Take the witness stand.

CHARLES ADDIS,

recalled as a witness on behalf of the complainant, having been previously sworn, on oath testified as follows:

Direct Examination, by Mr. Knoeller.

324 I have not been telegraphing answers to Mr. Klimek, who was just on the witness stand, by nodding my head and telling him what to say. When I went out of the hotel entrance to go to

the car, the only trouble I had was that there was such a crowd around the left of the car that I had to go around the front of the car. I did not see any of the pickets thrown to the ground.

RUBY VAN,

called as a witness on behalf of the respondent, having been first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Goldberg.

My name is Ruby Van, I am single and a member of the union.

325 I worked at the Hotel Plankinton for five years before the strike. While I was sitting back of Mr. Addis he would bow his head or shake his head indicating either yes or no answers.

Cross-Examination, by Mr. Knoeller.

I am out on strike and a member of Local 122. I was sitting directly behind Mr. Addis. I could not see his face.

326 **ELIZABETH MINOR,**

called as a witness on behalf of the respondent, having been first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Goldberg.

My name is Mrs. Elizabeth Minor. I am a striking employee of the Plankinton Hotel. I have worked there for three years. I was sitting directly behind Mr. Addis while Mr. Gerald Klimek was being questioned. I saw Mr. Addis

shake his head when Mr. Goldberg questioned him and when he saw him stopping he would nod or shake his head.

327 **ALFONSO GAMBY,**

called as a witness on behalf of the respondent, having been first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Goldberg.

I am the president of Local 122. I was sitting two rows behind Mr. Addis while Mr. Klimek was being examined. The girl called my attention to the fact that Mr. Addis was shaking his head both up and down and sideways. I stood up to see if he was moving his hands. He had them in a folded position. He shook his head, indicating a yes answer by up and down movement and a no answer by shaking from side to side.

328 **Cross-Examination**, by Mr. Knoeller.

I was two rows behind Mr. Addis. The row in front of me was occupied. I was standing up.

GERALD KLIMEK,

recalled as a witness on behalf of the complainant, having been previously duly sworn, on oath was examined and testified further as follows:

Direct Examination (continued)
by Mr. Knoeller.

I never had any signals given to me by Mr. Addis at all.

PAUL ZIEBELL,

called as a witness on behalf of the complainant, having been first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Knoeller.

329 I am a bellboy at the Plankinton Hotel, and became such on November 2nd, the day the strike started.

On November 7th, about 10 o'clock in the morning, I had taken two sample cases from a guests' room to be given to a taxi driver for shipment via the Railway Express. I set the grips down inside the vestibule on the Plankinton street side of the hotel and spoke to a cab driver, who was not certain what the fare was to the express office. He said he would find out. In the meantime I stood there in the doorway with the door open and had my arm on the door.

330 The pickets were marching out in front, carrying signs. James O'Brien began saying nasty remarks, as he always did, calling me all kinds of vile names. I told him to keep still and to mind his own business. I noticed that he gave a sign to the picket in front of him, and they came walking over to the doorway, and I stood there, and I glanced around a bit, and before I knew it he hit me in the neck with his fist. Before that he had been parading with the pickets directly in front of the hotel. He called me a bastard and a pimp, and all other kinds of names. After he called me names he handed the sign to the picket in front of him, came walking up, glanced around

bit, and then struck one blow in the right side of my neck.

331 To protect myself, voluntarily I let my left hand go out and I hit him once. That was all that happened. Before I knew it, the policeman was there and he was taking him away. I was sitting directly beside Charles Addis when Mr. Klimek was testifying and did not observe him telegraphing any signals whatsoever to Mr. Klimek.

Cross-Examination, by Mr. Golderg.

I was a bell man at the Plankinton since November 2nd. I don't know if I was a member of the union or not; they suspended me so many times.

332 I was suspended for not paying dues. I don't know whether I was a member in good standing on November 2nd. The hotel did not ask me when they hired me. They asked me if I was a member of the union, but did not ask if I was a member in good standing.

On November 7th I motioned to the taxi driver to take two sample cases to the express office to be shipped to New York. I don't know where the salesman was from. I don't know how long he had been at the hotel and I don't know his name.

333 He was checking out of the hotel at that time.

BERTHA ALTMAN,

called as a witness on behalf of the complainant, having been first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Knoeller.

I am the public stenographer at the Plankinton Hotel. I saw the altercation between Mr. Ziebell and Mr. O'Brien on November 7, 1939, at about 10 o'clock in the morning. I was standing near the porter's desk and looked towards the east entrance. This is about twenty-five or thirty feet from where I was.

334 I saw Paul, the bellboy, standing at the outside partly-opened door, and saw one of the pickets, James O'Brien, come up and strike him. Then Paul ran out after him and struck him, throwing him down. Then Lester, one of the other bellboys, came out to help Paul, and they held the picket until the policeman came.

Paul was inside the hotel, behind the doors, when Mr. O'Brien came up to him. I was sitting directly beside Mr. Addis, to his right, at the time Gerald Klimek was testifying and did not see Mr. Addis telegraphing any signals to Mr. Klimek upon the witness stand.

Cross-Examination, by Mr. Goldberg.

I was standing in the inner lobby, near the porter's desk, opposite the elevators.

335 I would say this was twenty-five or thirty feet away from the first east door. First there are revolving doors, then an inner lobby, and then

another set of doors. Mr. Ziebell was between the revolving doors and the outer set of doors. I did not hear any conversation that went on between them.

LESTER RAASCH,

called as a witness on behalf of the complainant, having been first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Knoeller.

I am a bellman at the Plankinton Hotel, and I witnessed the encounter between Mr. O'Brien and Mr. Ziebell on November 7, 1939.

336 This happened about 10:30. I was standing at the east end of the front desk. I was about fifty or sixty feet from the outer doors of the east entrance of the Plankinton Hotel, but I had a very clear vision through the glass in both doors. While I was looking around I looked out the east entrance and saw Paul Ziebell standing in the vestibule with those two grips. Then I saw him motion and a taxicab driver came over, and he talked to the taxicab driver for a little while and the taxicab driver went away. I don't know what it was about. Paul opened the outer door of the vestibule a little ways and leaned his arm against the silver bar. He was still inside the vestibule. At that time I noticed James O'Brien in the picket line carrying a sign. As he came around in a circle closer towards Paul he made a motion at him with his fist. When he did that I walked over to the vestibule doors there,

because I had known that he was kind of nasty. The night before he had spit on me when I was holding the doors open for the engineers to come
337 in. He did this while he was on picket duty. Before that, while I had been loading baggage at the rear entrance, he told me that if I came outside he would beat me up. When I saw him threaten Paul I thought something was going to come up, so I went over there. I was about ten feet from Paul, but couldn't hear anything, because the doors were shut. O'Brien walked around again in this circle, and when I got close to Paul he handed his sign to the fellow in front of him and walked up to Paul, looked around a little bit, swung out with his left hand and hit Paul in the neck. Paul opened the door wider and swung back and knocked him down. O'Brien used his clenched fist. After Paul knocked him down he started to get up. I rushed out and tried to hold him down, and he tore the lapel of my bellboy uniform. By that time the policeman came and took him away.

338 I also had an encounter with Charles McLaughlin about 11:30 one morning; I don't remember the exact date, but it was about a week and a half or two weeks after the fight between Paul Ziebell and O'Brien. While I was on duty somebody asked me to come outside and help him. I told him that he was not allowed to do so, because Mr. Wood had given definite orders not to go outside, because he didn't want any violence to occur, but if the guests absolutely demanded it, we should keep quiet and not answer back. So I

went outside with this gentleman, who had a Ford coupe, and I walked towards the rear of the car. When he opened it up I saw that there was
339 salt in there. The salt was for the hotel. There were five or six bags of about 100 pounds each. I grabbed one of the bags and started towards the door. The women pickets in the line, two of whom I recognized as former employees, started crowding around me and pulling at the salt, kicking me and calling for help. Before I got half way to the door Charles McLaughlin and several other men came running and started hitting me with his first. He struck me three or four times in the face. By that time the policeman got hold of me and I brought the salt in and went back and got one more. Mr. Wood said I shouldn't go out any more. About three minutes after that occurred the sergeant of police told me that they had arrested McLaughlin and wanted me to come down to court with him. Both of my arms were occupied when I carried this salt.

340 Mr. McLaughlin came from the side. I don't know if he said anything to me at all. There was so much noise going on. When the policeman grabbed him, the policeman said, "You can't do this." Mr. McLaughlin said that I can't get this bag of salt in there, either.

Cross-Examination, by Mr. Goldberg.

When I came out for the salt I did not throw over any of the lady pickets in the line. I did not know some of the girls were thrown to the floor.

I was the only bellboy who came out, and if the lady pickets were thrown I don't know who did it. I know that in my last hearing at Judge Neelen's court, counsel for the union tried to bring that point out, too, and the girls testified that I threw one or two of them to the floor, but I don't remember doing it. Mr. McLaughlin said in court that the reason he had that controversy with me was because I threw those girls down.

341 I went to work for the Plankinton the second day after the strike occurred. They asked me if I was a member in good standing in the union, but I said, "No." I am still working at the Plankinton as a bellboy.

342 **HARVEY WEBER,**

called as a witness on behalf of the complainant, having been first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Knoeller.

I am a steward at the Plankinton House. On November 5th I and Mr. Hundt tried to make a delivery of clean wash by automobile from the Plankinton House to the Kilbourn Hotel at about 2:30 in the afternoon. We were at the receiving entrance on the west of the building.

343 There were only two pickets at that door. As I walked outside four or five or six men came from across Michigan street, got into the picket line, and started parading around in the line, so that it was impossible for us to drive a car up there. Mr. Hoffman decided that we would abandon it

and wouldn't go through with it. While they were parading back and forth they saw James Myrick inside the building. They started to holler at him; called him a scab, a dirty rat, and told him they would get him later. At the time that we attempted to make the delivery there were about
344 ten or twelve pickets there. They were about two feet or so from the building. One of them jumped on the other steps, looked into the window, and saw James Myrick and hollered at him.

On November 4, 1939, a salesman from the Automotive Electric Association attempted to deliver some displays and samples at the receiving entrance. There were about ten pickets at that time. The two salesmen wanted to unload their samples and place cards. Mr. Valley told them that they had no right to bring that stuff in because there was a picket line and nothing was supposed to be brought into the building. The officer told them that he had a right to bring that in. He told the officer that he didn't have any authority from Captain Polcyn.

345 When he said that I stepped up and said that he had authority from Captain Polcyn, because I talked to Captain Polcyn myself, and Captain Polcyn said we could bring anything into the building or anything out of the building that we wished; that there was nothing to stop them from unloading or receiving. Mr. Valley talked with the gentlemen and asked them whether that was union made stuff and whether they were union. They said they were not. I asked the men to let me have the packages. Mr. Valley turned as I

had my hand out to take the packages and pushed my hand away. He stared at me for a minute and took off his glasses and said, "If you fellows want to get tough, we'll get tougher." The salesmen put their things back in the car and Mr. Valley walked away. Heisdorf then told me that I had better lock up the doors and bar them, because I wasn't going to get anything in or out of that building.

I had a conversation with Mr. McLaughlin on November 13, 1939, while we were unloading some
346 paper, and we told a junk dealer he could have the paper if he took it away. It was just bales of waste paper. McLaughlin talked to the truck driver ten or fifteen minutes. The man then said that he wouldn't haul it because they might make trouble, and he didn't want to get into trouble. He said that for the little bit he could get for the paper it wouldn't pay for him to haul it. As I was going to pull the bale away from the door so
347 I could lock the door, McLaughlin hollered at me and made vile statements. I didn't pay any attention to him. He called me a rat and a fink.

Cross-Examination, by Mr. Goldberg.

I don't know what a fink is. I don't know that it is the name given to a fellow who doesn't go out on strike and works at a strike-bound place. I have worked at the Plankinton for two and one-half years as a steward, but am not a member of the union.

348 I was not advised by Mr. Wood, or anyone else in authority, that I have to belong to the union.

I was never told that the contract provided that the inside day steward, the inside night steward, the storeroom man, the assistant storeroom man and storeroom sorters were required to belong to the union. Neither Mr. Wood nor anybody else in authority at the Plankinton told me that I had to belong to the union.

349 In a conversation in the court room corridor on December 1st I did not say that Mr. Valley did not touch me. I said that he pushed my hand.

I never told Mr. Knoeller, Mr. Richardson, Mr. Robertson or Mr. Wood that Phil Valley battered me and assaulted me. I don't know why that is in the complaint.

350 I am also the purchasing agent at the Plankinton Hotel.

JAMES MYRICK,

called as a witness on behalf of the complainant, and being first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Knoeller.

I am a busboy at the Plankinton Hotel. At about 6 o'clock on the evening of November 6, 1939, three or four large bus loads of Purdue engineering students came to the hotel. While I was hold-
351 ing the south door open for them to enter on the Michigan street side, James O'Brien, a picket, passed close to the door and spit in my face. I reported this incident to the officers and questioned O'Brien, O'Brien telling them that they could not prove it. I was present on November 5, 1939, when Mr. Weber and Mr. Hoffman attempted

to make a delivery of wash from the Plankinton Hotel to the Kilbourn Hotel. I went downstairs and brought up the baskets in the elevator and put them inside the receiving entrance to put into the car when the time should come. There were only one or two pickets there when we started out, and when Harvey and Mr. Hoffman walked outside then about six or seven men came across from the south side of Michigan street, started picketing around the rear door about a foot or so away from the building. They were all trying to see what we were doing on the inside. They were yelling and shouting on the outside. Mr. Hoffman said we should give up the idea and wait for a better time to move it.

Charles McLaughlin spoke to me. He jumped
352 upon the stoop and looked at me, calling me a dirty rat and scab, and stated that he would see me later.

Cross-Examination, by Mr. Goldberg.

Mr. McLaughlin said, "I will see you later and we will get you later." He spoke to me for quite a while. This happened on Sunday, November 5th, and although this is December 11th, nothing has been done to me during this time except that once they tried to stop me from coming in on the Plankinton street entrance. Nobody has hit me. One or two of them have offered to fight with me a couple of times. I did not take up the offer and nothing was done.

353 I worked at the Plankinton before the strike in the capacity of busboy. I am a member of the

union, but am behind in my dues, but they still let me work. My mother is out on strike at the Wisconsin Hotel. She tried to call me out, but I stayed at the Plankinton.

THOMAS JAMES,

called as a witness on behalf of the complainant, having been first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Knoeller.

I am a laundry man at the Plankinton Hotel. When I just got back to work on November 17th,
354 I was a helper. Late in the afternoon of that day, I had some trouble with a man named Larry C. McAllen. About 3:30 or 4 o'clock I left the hotel on the Michigan street entrance to go to the hospital to see my wife. I walked east on Michigan street as far as Plankinton avenue and walked north on Plankinton when Larry McAllen came up from behind and grabbed me and put
355 me down on the sidewalk and started hitting me in the jaw. He had his feet on my arms and had my arms pinned with his knees so I couldn't move. He had his hands closed and hit me on both jaws. He struck me quite a few times before the officer got there. This happened on the sidewalk in front of one of the shops in the hotel. I have seen a doctor with respect to my injuries, who has taken X-rays. It is badly bruised. I am still under a doctor's care. Mr. McAllen while he was striking me claimed that I stepped on his feet. He told me later and also said in court

that he had been talking to me for ten minutes before he hit me and that I had stepped on his feet.

356 On Wednesday, December 6th, when he was convicted he again said that I spoke to him ten minutes before he hit me. He was found guilty. I don't remember his saying anything at the time he struck me.

Cross-Examination, by Mr. Goldberg.

Mr. McAllen says that he and I had a controversy ten minutes before this happened and claims that I stepped on his toes. I didn't see him as I passed by. I know I didn't bump into anybody walking up the street.

357 I didn't see him before. I was in the picket line for one week and was removed from the picket line because I was drunk one night.

Redirect Examination, by Mr. Knoeller.

I did not step on Mr. McAllen's toes. He was not in the line while I was out.

EDWARD KNOPF,

called as a witness on behalf of the complainant, having been first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Knoeller.

I am a bell man at the Plankinton House, and was such on Tuesday, November 14th.

358 On that date I had an altercation with one of the pickets. I intended to take my car and to

drive one of the other bellboys to see his mother. As I stepped out of the east door on Michigan street and turned around to go north to get my car, one of the pickets, Tommy O'Mahar, kicked me in the back of the knees. The policeman had hold of him and asked him why he kicked me. I told the policeman that I worked at the hotel and asked that O'Mahar be arrested. They took him to the station house and I swore out the warrant. A few days later I saw him again and he told me to come outside after hours and he would take care of me. He said he wanted to get hold of me and raised his fist.

Cross-Examination, by Mr. Goldberg.

O'Mahar and myself had personal controversies that date back three or four weeks before the strike.

359 Neither he nor I were fired because we refused to work with each other. I did not try to get him laid off or fired, but I did refuse to work with him. At this time, O'Mahar was a bellboy. I don't know whether he was put on elevator service because of my refusal to work with him, but I refused to work with him the rest of that day because he hit me on the chin. This had nothing to do with the strike.

360 After this controversy and my refusal to work with him, he became an elevator operator, although at the time we had our controversy he was a bellman.

ELMER HUNDT,

called as a witness on behalf of the complainant, having been first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Knoeller.

I am the superviser of the Plankinton Hotel parking lot, which adjoins the Plankinton House. On November 9, 1939, while I was walking east on Michigan street, I passed Tommy O'Mahar and said "Hello" to him.

361 He said "Hello, you bastard," and told me he never did like me. I walked over to him and asked him if he meant me and put my hand on the side of his coat lapel. He lost his balance and went into the curb. I asked him if he really meant me, and he said "Well," and then the union assistant who was with him stepped in and said that O'Mahar was telling him a story. I told him that when you are telling a man a story and call him a name like that you should look a man in the face when you talk and not the pedestrian on the street. I haven't had any trouble on the parking lot during the strike. I found fifty shingle nails on my lot, but I don't recall the exact date. I showed them in the office and they made a memorandum of it. This was a week and a half to two weeks ago. The nails were found on three different days. There was a total of about fifty. After I cleaned them up one day there were nails the following day.

(Counsel for the union objected to the testimony and introduction of Exhibit No. 20, being

some of the nails purportedly picked up at the parking station referred to, for the reason that there was no connection between such evidence and the respondents or any issue in the case. Exhibit 20 was marked by the reporter and received by the Board subject to the objection.)

363 **Cross-Examination**, by Mr. Goldberg.

I do not know whether Mr. Robertson, one of the attorneys for the hotel, Mr. Richardson, president of the Hotel Company, or Mr. Knoeller, put those nails on the parking lot in order to get the union into bad light. I don't know whether Mr. Fuldner, who was in the contracting business and may have access to nails, left those on the lot. I know who put the nails there. I have been watching the lot. There were ten pickets walking in the alley, and I picked the nails up at 9:30 one morning and 3 o'clock in the afternoon. There were some more tacks that an officer
364 picked up off that same part of the lot next to where the pickets were walking. I did not see who put them there.

We have chased some of the pickets off our lots carrying signs. Actually I don't know who left them there.

Mr. Goldberg: We again renew our objection, and ask that it—renew our objection and ask that that testimony in regard to those nails be stricken, and that my motion objecting to the acceptance of the receipt of those nails as an exhibit be granted.

Mr. Knoeller: I think counsel himself has identified the nails right near the pickets.

Commissioner Gooding: We'll rule on it at the conclusion of the testimony.

365 **FRED LANGDON,**

called as a witness on behalf of the complainant, having been first duly sworn, testified as follows:

Direct Examination, by Mr. Knoeller.

I am a valet at the Plankinton House. On the evening of November 11, 1939, I stopped in at the "Big Stein," a tavern next door to the hotel, for a couple of glasses of beer. Two gentlemen came in and sat down at a table not far from me. When they saw I was alone they came over to where I was. One fellow told me that he understood I was working in the laundry. I told him that I wasn't. He stated that he knew what all of us were doing there and that they knew I was working in the laundry. The other fellow started to talk to me while he was standing on the side of me. While I turned to look at him the other boy slugged me and hit me on the chin or right on the cheek.

366 I was facing north and the other boy was on the east side of me, and as I turned to face him the other fellow slugged me on the left side of the face.

The tavern does not belong to the hotel. It is in a different building, next door to the hotel.

He said, "Let that be a lesson to you," and both of them walked away out of the back door. He hit me with his clenched fist. They did not call me any names. I was wearing glasses and

I am a cripple in that my left arm is stiff since I was 10 years old. I can raise it, but I can't bend the elbow. I did not strike back at these men.

Cross-Examination, by Mr. Goldberg.

I was a member of the A. F. of L., Union Local
367 122, and was at the time the strike began. I did not go out on the picket line, but kept on doing my regular, normal work. The hotel has a laundry, the employees of which belong to the Laundry Workers Union. As a valet I don't do laundry work any time of the year.

368 **RUDOLPH STANO,**

called as a witness on behalf of the complainant, having been first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Knoeller.

I was bellman at the Plankinton House on November 17, 1939.

I had trouble with Joseph Hofich, captain of the pickets, at about 3:30 in the afternoon, but I can't remember the date. One of the guests, who was parked out in front of the hotel in the loading zone and had a couple of pictures wrapped up, asked me to take two of the pictures to the car and he would take in the other one. I took the pictures and waited until all the pickets got on one side of the sidewalk, at the end where they usually turn, and took the pictures out to the car. As I got finished putting the pic-

tures in, Mr. Hofich jumped on my back and started slugging me with his clenched fist.

369 I had not said anything to Mr. Hofich or to any of the pickets at that time. Mr. Hofich said, "You bellboys think you are pretty smart, don't you?" I didn't answer his question. I was in District Court on Wednesday, the 7th, at which time Hofich was found guilty.

Cross-Examination, by Mr. Goldberg.

I did not call Hofich names and I didn't swear before some of the lady pickets. The officer was closer to me than the lady pickets were, and the officer didn't hear me say a word. I started to work at the hotel last March. I was a member of the union at the time I went to work. At the

370 time of the strike I was a member in good standing.

WARD WHITNEY,

called as a witness on behalf of the complainant, having been first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Knoeller.

I am a busboy at the Plankinton House.

On Saturday, November 18, 1939, at about 4:30 in the afternoon, I left the hotel. As I got in front of the Big Stein Tavern, which is right next to the hotel, one of the pickets jumped on my back and said, "So you work at a scab hotel, do you?" I didn't say anything to him. He tangled with me there for a minute and struck

several blows. I returned some. A policeman came and this fellow started running up the alley aside of the Plankinton Arcade.

On my way home I got off a street car on the corner of Eleventh and Wisconsin and started walking west on the avenue on the north side of the street. I met two fellows. One of them
371 asked me if I still worked at the hotel. I said, "Yes." He said, "Now you're going to get it." Then he doubled up his fist and hit me and the other fellow jumped on my back. I knocked the first fellow down and succeeded in throwing the other fellow onto the sidewalk. Then I ran right home. The first fellow who struck me used his clenched fist and struck me four or five times in the face and chest. The fellow who attacked me on Eleventh and Wisconsin used his clenched fist and struck me in the chest.

Cross-Examination, by Mr. Goldberg.

There were no arrests in either incident. I never saw either of the men before in my life. They evidently knew me and called me by name.
372 There are no witnesses that I know of who saw it. This happened about 5 o'clock in the afternoon.

Redirect Examination, by Mr. Knoeller.

I did not stand around to take the names of witnesses. I didn't stop for anything. I don't know how many men were around there, if there were any more around there. I went right home.

Cross-Examination (Continued),
by Mr. Goldberg.

I worked at the Plankinton since November, 1935. I was a member of the union until this strike was called.

373 I did not go out on strike.

Questioned by Commissioner Green:

I did not see this person who attacked me at the hotel as I came out. I heard him running, and as I started to glance he grabbed me by the shoulders and turned me around.

VINCENT STAFFARONI,

called as a witness on behalf of the complainant, being first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Knoeller.

I am a porter at the Plankinton House.

374 I saw Mr. Ward Whitney leave the hotel on November 18, 1939, at about 4:30 o'clock in the afternoon. I was eight or ten feet behind him when I saw a fellow leave the picket line and kind of trot behind him a little. While the officer was looking the opposite way the picket turned Whitney around and was swinging at him. I informed the officer that one of the employees was getting hit by a picket. I saw the picket strike four or five or maybe six blows. Whitney had his coat down by his arms and couldn't do anything. I saw him duck around. I was right out in front of the hotel at the time, about twenty feet away.

375 When the officer came rushing up to the scene

of the encounter the picket ran away through the alley toward Second street.

Cross-Examination, by Mr. Goldberg.

I was a member of the union before the strike and went out on strike for about a week. I did not go back because Mr. Wood gave me $35.00 to pay for furniture. He didn't give me any money. I never told any pickets that. That is not why I went back to work.

376 **PHIL VALLEY,**

recalled adversely as a witness of the complainant, being previously duly sworn, on oath was examined and testified as follows:

Direct Examination, by Mr. Knoeller.

Before I pulled the strike on November 2, 1939, I did not contact the other unions and solicit their support.

(It was stipulated by Mr. Goldberg "that the other unions refused to go through a picket line and aren't working. I will stipulate that, but not that there is a sympathetic strike.")

377 I did not contact some of the business agents of the other unions before the strike. I did talk to them immediately after the strike. They did not tell me that they would order their members to cease work, just that their people are not allowed to go through the picket line and that they would not permit them to go through a picket line. The Laundry Workers and other

unions also picketed at the hotel and carried the signs of the other unions, together with the Local 122 sign. They are still picketing today. The local joint executive board ordered Mr. Burgarino of the Bartenders' Union to order all of the bartenders to walk out on strike.

378 The local joint executive board is composed of Local 405, Local 64 and Local 122. It was the supreme court for all the three locals in Milwaukee. They ordered the other unions to go out on strike.

I did not tell the laundry men and all the others to walk out. I told the bellboys and the people in the lobby that were my people that a strike was called. I told one girl in the coffee shop. There was only one there. I did not go into the kitchen. I believe the dining room was empty except for three boys gathering some dishes, who told me that they were not going out on strike. I told them that they were making a mistake staying in if they belonged to the union.

379 I told the bellboys that the strike was called; in fact, they were waiting for it. Somebody else told the maids. They said they wanted to see me to find out if it was right. I told them that everybody should go out because there was a strike.

HIRAM WOOD,

called as a witness on behalf of the complainant, having been first duly sworn, on oath testified as follows:

380 **Direct Examination,** by Mr. Knoelier.

My name is Hiram O. Wood. I am manager of the Plankinton House. On November 2, 1939, I met

Mr. Phil Valley, who came in to announce a strike to the employees. We talked together later that day. Either he or his employees went to every department in the house that was working at the time—laundry, housekeeping department, front office, kitchen and maids. At that time we were oversold. The house was full of school teachers particularly, who were here in a convention. I heard later that somebody at the Engineers Union had phoned them to leave the house.

381 I spoke to Frank Burgarino of the bartenders the next day, who insisted that the bar be closed. He stated it was very embarrassing for him for the bar to remain open when the hotel was on strike. The strike was called at about 4 o'clock in the afternoon and a picket line of forty-five or fifty was formed immediately afterwards. The Plankinton avenue and Michigan street entrances, and the receiving entrance in the alley to the west were picketed and are still being picketed. I have seen Building Trades, Laundry Workers and Hotel Employes using signs.

382 I don't recall seeing an Engineers sign.

I held a meeting on November 1st after the arbitration award had been signed, in one of the large meeting rooms at the Plankinton House. There were present as many of the employees as we could summon from their work. I read them a letter and tried to explain it to them with some care that we were mailing that night to advise them of the situation. I wanted them to know that we were agreeable to accepting the award of the arbitration board.

(Exhibit 21 marked for identification is a true and correct copy of a letter which was read to the employees at that meeting and was received into evidence.)

383 On November 3rd, the day after the strike, approximately half of the workers had returned. Many more had returned since. I have prepared a list showing the number that have returned to work. I was present on November 10, 1939, when an attempt was made to deliver ice at the hotel. I saw eight or nine busboys or perhaps six or seven leave the hotel in uniform and followed them to the door and saw an ice delivery about to be made. By the time I got there one of the cans of ice had been tipped over and our ex-doorman, Charles Alden, was strenuously pummeling one of
384 the boys. One of the union fellows was tipping over another container of ice cubes. I saw John Heisdorf, who was right back of Alden, and a young fellow tipping over a garbage can of ice cubes. I saw Mr. Heisdorf himself lay hands on the cans of ice and tip the ice.

On Sunday, November 9th or November 19th I found a stench bomb in the hotel.

Mr. Goldberg: I object to this testimony unless it will be in some way connected, Mr. Commissioner. Same objection as to the previous reference to the stench bomb.

Commissioner Gooding: Well, unless it is in some way connected it, of course, won't be considered in arriving at a conclusion.

I found an odor in the lobby of the hotel about 10 o'clock in the morning and searched the origin

of it, and finally found that stench liquid had been pretty generously distributed on the third floor, and in searching around for the container found a quart bottle about half full of the same stuff under
385 a couch at the elevator landing. The odor is still there at the present time. The hallway on the third floor is carpeted and is about eighty feet long. This liquid was spilled along thirty feet of the hallway immediately adjacent to some of the dining rooms.

On November 26, 1939, the north window on the rear elevator landing on the main floor was broken.

(Exhibits Nos. 22 and 23 were identified as being pictures of the broken window and pane and were received into evidence.)

386 Mr. Goldberg: We object to the receipt of the same.

Commissioner Gooding: Go ahead.

Mr. Goldberg: On the same—for the same reasons as we objected to the other testimony. There is no connection between the breaking of these windows and the issues presented at this hearing.

Commissioner Gooding: Well, there isn't up to the present time, but there may be; I don't know.

Mr. Goldberg: Well, if there is no further connection, I move now that as soon as their case is through it will be stricken.

Commissioner Gooding: They will be received at this time subject to the objection.

Examination of Mr. Wood (resumed).

The picketing has been very unpleasant, and jeers.

387 One of the pickets spit on me one night. It didn't hurt me any, but I saw it or felt it. I am not offended, however, about it. I heard pickets call, boo, hiss and sneer at guests all day and all night from my office. They are boisterous in the sense that they are jeering and hooting. I received reports of the violence that was committed against some of the employees and in regard to the eating of peanuts in front of the hotel. The pickets eat peanuts and throw the shucks at the entrance. We have had several complaints from the guests that we ought to clean it up. We do it, but it occurs again right away. It is rather a hopeless task.

388 I saw pickets carrying sticks or clubs in their hands in front of the hotel only once. There is yelling and hooting, and the arrival of every cab calls for the announcement that they should go to the Schroeder or some other place.

Out of 188 employees we have about 148 returned to work.

Question by Commissioner Gooding:

Q. By 148 returned to work, you mean 148 of your former employees returned to work?

A. Yes, sir.

Examination (resumed), by Mr. Knoeller.

Outside of Mr. Alden and Mr. Tom O'Mahar, none of the others who committed acts of violence are former employees of the hotel. The hotel is now operating.

389 **Cross-Examination**, by Mr. Goldberg.

I have a list of our 188 employees and those who have gone back to work.

(List marked "Respondent's Exhibit No. 24.")

Respondent's Exhibit No. 24 is a list of employees, showing the dates when they were engaged and when they left. It consists of six typewritten sheeets, showing the employees as of date of June 16, 1938, their date of employment, their date of leaving, the employees as of December 1st, the date they were employed and those out on strike.

390 According to this exhibit, the hotel has 188 employees, 148 of whom are back at work. The day the strike was called Mr. Valley had conferred with me with regard to signing the supplemental contract that the majority of the hotels signed. He also conferred with me on the preceding day. The strike was not called until after I told him to contact Mr. Robertson to determine whether or not a contract would be signed. I don't recall when I learned that Mr. Robertson told him that the hotel would not sign the contract, and that if the union wanted to call a strike, it was up to them. Mr. Valley told me that if there is any possible way of signing the contract, he would prefer to have me sign than to subject the hotel to a strike.

391 I had no authority to sign the contract, however. Mr. Valley told me that the orders had been that a strike should be called at the Plankinton House the day before, but that he carried it along two days and tried to get us to sign so that he

wouldn't have to call a strike. When I called the employees together in room 312, I knew that under the contract of June 16, 1938, the union was the bargaining agent for the employees.

392 The purpose of the meeting was not to prevent them from going out on strike, but to acquaint them with the situation, because they were entitled to know about it. I did not think that I ought to tell them to go to the union to find out what had happened. The strike was not discussed at all at that meeting. The purpose was to read to them this letter which was going in the mail, and explain it to them. I wanted them to know about it earlier than the following day, when the letter would be received by them. I also read the arbitration award over the telephone to you, and they heard me read it. I did not read it to them. I read only the letter.

393 Mr. Hoffman and Mr. McCarthy of the Kilbourn Hotel were also present at this meeting. They are the managers of that hotel. The Kilbourn employees were not available. It was my intention to have the manager of the Kilbourn Hotel read the same letter to the Kilbourn employees.

394 I did not read the contract to the employees. I notified the employees that the hotel was willing to sign the award of arbitration.

395 The contract was not mentioned at the meeting, to the best of my memory. I read the letter and explained each paragraph to them. I see now that the letter refers to the contract, so I did discuss the proposed contract. I did not know that when we are discussing a contract you must dis-

cuss it with the bargaining representatives and not the employees. I didn't give that one thought. I didn't think that we would be interested with the rights of the employees to designate bargaining representatives to act for them.

396 It is not true that we claimed we could not sign a closed shop contract with the union because the law didn't permit us to violate the rights of the employees. We refused to continue the closed shop contract because of the arbitration award. I do not know that their bargaining representative stated the only reason our hotels and the other hotels refused to sign a closed shop contract was because under the law they couldn't do so. We didn't care to sign a contract without arbitration.

397 I know that we had several conferences with respect to signing a contract before the arbitration. I know before the suggestion of arbitration that the union elected to continue the old contract, but asked for certain changes. We had received such letter from the union. I know that the union presented certain demands.

398– (Discussion between counsel and Commissioner
399 Gooding with respect to materiality of questions going to witness' familiarity with negotiations prior to arbitration.)

400 I knew that for all practical purposes the union had trimmed its demands to merely one week's vacation with pay.

401 I do not remember saying to Mr. Valley that the vacation with pay article didn't bother us very much because most of our employees were

getting vacations with pay anyway. It is not true that half of our employees were already getting vacations with pay. I don't know how many employees were receiving vacations with pay. There were quite a few but just exactly how many I wouldn't be able to guess.

Q. Now, Mr. Wood, your guests are given access to go into the hotel? They go in, don't they?

A. Yes, we are open.

Q. The hotel—the guests—scratch that. The pickets do not block their entrance and prevent them from going in?

A. No.

Q. What they are trying to do is to induce them not to patronize your hotel, isn't that right?

A. Well, that is pretty well qualified, but that is correct, yes.

402 I didn't expect that the union would try to induce the people not to patronize us in the manner they done, not by calling everybody a scab and spitting at them, and do these different things that have been reported to me. I saw no instances of spitting, except the one instance to myself but there were many reported to me.

Mr. Goldberg: "Well, I will say this for the record, for the union officials, and for myself, we don't countenance it, and there is going to be same pretty severe instructions, if that has taken place."

Examination resumed, by Mr. Goldberg:

I do not know the name of the party who spit at me.

403 I did not tell my employees not to go on strike.

After Mr. Valley left, I remember asking some of them if they were all going to desert us, or if some of them were going to stay. I didn't try to prevent anybody leaving the hotel that wanted to go. I didn't go downstairs with Mr. Valley for the purpose of preventing the girls from going out on strike, but to view the procession, as it were.

Complainants rest

404-428 **HIRAM WOOD,**

called as a witness adversely on behalf of the respondent, being previously duly sworn, was examined and testified as follows:

(This testimony is omitted because it deals with the question of interstate commerce. That issue has been abandoned by the petitioners for the purpose of this appeal.)

429-465 (This testimony omitted, since it relates to the application of the independent union for an election and certification, which is not a factual issue on this appeal.)

465-495 (Testimony omitted because it deals with the question of interstate commerce, which issue is abandoned for the purpose of this appeal.)

495-497 (Testimony omitted because it relates to the petition of the independent union.)

499 **Hiram O. Wood** testimony (resumed):

Adverse Examination, by Mr. Goldberg.

I recognize Exhibit No. 10, which is a copy of a letter under date of November 1st sent to Mr.

Goldberg, the original of which I signed. I note that by the last paragraph in that letter I advised Mr. Goldberg that the arbitration decision has no bearing upon the relationship between the Plankinton and Kilbourn Hotels and Local 64, Bartenders International League of America; Local 311, International Union of Operating Engineers, and the Milwaukee Building Trades Council.

500 We did not convey that information to the representatives of the independent union when they requested a unit covering the employees within the jurisdiction of those three unions. We have never received a notice from Local 122 terminating the contract, nor did we ever send a notice to Local 122 indicating our election to terminate the contract. Likewise, we did not receive any such notice from Local 174, Laundry Workers, nor did we send them one.

501-505 (Omitted, since it bears upon questions relating to the independent union.)

506 After the 1937 contract was signed, I do not remember advising any dining room employees, particularly the waitresses, that they did not have to join the union.

507 To the best of my memory, I only explained the contract to occasional people that asked me what was required under its terms. I did that to the best of my ability. I might add that the contract, after being signed, was sent to the department heads of the hotel so that each and every one had access to it and read it for themselves.

I do not believe that I instructed Mrs. Peggy

Helmeyer to advise the waitresses that under the signed contract they didn't have to join the union, I do not know whether she did that. I do not believe that any such notice was posted on the bulletin board of the hotel where the employees could see it; I don't remember.

508 When the modified closed shop contract went into effect the waitresses were not given a raise. That was not required by the contract.

509 I know George Bournak, who was formerly associated with Local 122. I do not have any personal dislike for Mr. Phil Valley.

Q. Now, did you or did you not give a personal check to George Bournak about January—the first part of January, 1939, in the sum of $20?

A. No, sir.

Mr. Knoeller: What was that name?

Mr. Goldberg: George Bournak.

Mr. Knoeller: What date was that?

Mr. Goldberg: I said first part of January.

Mr. Knoeller: Which year?

Mr. Goldberg: 1939.

Mr. Goldberg (Q.): State whether or not you

510 gave George Bournak a personal check; that is, your own check, signed by you, payable to cash, in the sum of $20, in February, 1939.

A. No, sir.

Q. Will you bring in your bank book, your check book and your bank statements for January and February, 1939?

A. Yes, sir.

Mr. Knoeller: That is objected to unless there is more connection shown. It is irrelevant, in-

competent and immaterial so far as the record now stands, no basis for it.

Mr. Goldberg (Q.): Mr. Wood, would your answers——

Commissioner Gooding: Just a minute. I will sustain that objection unless there is some——

Mr. Goldberg: I am going in that further.

Q. Mr. Wood, would your answers be any different if I said the amount of the check was $25.00 instead of $20.00?

A. No, sir.

Q. Now, would this refresh your recollection? Did Mr. Bournak ask you to contribute any money in January or February of 1939 so as to pay for printing to oppose Phil Valley in his election for the office of business manager?

A. No, sir.

Q. If the Board please, I ask that Mr. Wood be directed to bring in his personal checking account for January and February of this year, as we propose to establish that a check was issued payable to cash in the sum of $20.00 or $25.00 turned over to Mr. Bournak and in turn paid for printing leaflets running down Phil Valley and trying to defeat him as business agent of the union, and it shows—for the purpose of showing two things: First of all, intent to interfere with the operations of the union on the part of an employer, and, second, to deal—in connection with the veracity of Mr. Wood as a witness.

511 (Discussion as to pertinency of above testimony.)

512 I recall having a conversation with John Alex-

ander after the union election, but do not recall saying to him after he told me the results of the election that it was too bad for the union. I didn't have any opinion as to what was too bad or too good for the union. I don't know how the conversation between me and Mr. Alexander came about. Mr. Alexander must have wanted to talk to me about it. This conversation took place in the lobby of the Plankinton House.

513 (Discussion between counsel establishes election referred to was conducted in February, 1939.)

Again referring to Bournak and the check incident, I don't remember whether or not I gave a check to him in the sum of $25.00 between the 1st of February and the 10th of February, 1939, to pay for campaign literature of Jules Desautelle and John Alexander. I was so frequently called upon for advertisements, for the purchase of tickets, or to help for something or other, some of which I subscribed to and some of which I didn't, that I don't remember.

Q. Well, now, do you recall giving a check to George Bournak for $25.00 between the 1st of February and the 10th of February for any purpose?

514 A. No, I don't recall it.

Q. You don't recall it? If you had given it to him you'd recall it?

A. No.

Q. Oh, you wouldn't recall it?

A. No; not necessarily.

In the summer of 1938, when the 1937 contract came up for renewal, we signed a closed-shop agreement. That was the first time in the history

of our hotel that substantially all of the employees had to belong to a union in order to work at the hotel.

515 Under certain conditions, I am in favor of a closed-shop contract, but in this particular case I wasn't, because it forced too many of our employees to joint against their wishes. I have not promised anybody since the commencement of the strike that if they will refuse to strike, or if they will come off the picket line, or more particularly if they will work during the strike, they will have a job with the hotel for life. At the meeting, held at room 312, I may have told the employees that I have tried to be a good boss.

516 I don't remember. I did not make that statement with the intent and purpose of having my employees refuse to go out on strike. I don't believe I made such statement. I didn't tell my employees that I had been good to them and that I didn't think it was necessary for me to sign a contract.

Reference was made at this meeting as to whether or not the union would blackball anybody who did not go out on strike. I don't remember Mrs. Hehmeyer stating that she didn't think the 517 union would go to that extent. I answered the question. I said: "Let's not go into that at all. I didn't bring you up here for such discussion. I just wanted to read this letter to you." My purpose in reading that letter was to explain carefully that we are willing to agree to the award of the arbitration board, since we were putting it in the mail that night and some of them would not

have received it until the second day following. I was very careful so as not to try to influence them in their decision in any way. If I had been trying to persuade them not to go on strike, I would have been more direct. I told them specifically when the meeting started that there was to be no discussion either pro or against the union; that I was simply going to read them a letter that was being put into the mail to them that night and that I wanted them to understand the different paragraphs of that letter.

518 I am not acquainted with the ability of my employees to read.

519 I did not send any telegrams to employees asking them to come back to work. I do have here four copies of four telegrams that I did send them. Exhibits 39, 40, 41 and 42 are telegrams addressed to four individual employees of the Plankinton Hotel.

520 All of the telegrams except one are under date of November 5th. One of them reads: "Please call me on the phone as soon as convenient," and the other reads, "Please telephone me at your earliest opportunity."

521 When I answered that I didn't send the employees telegrams to come to work I meant that I did send them telegrams to phone me.

After these telegrams were received some of the employees phoned me. I don't know whether all of them did or not. I suggested that they return to work; that we are open and operating and would be glad to have them back. I did not assure them of permanent jobs for life. I don't recall sending any other telegrams besides these.

522 I did not tell any of my employees that if they worked there during the strike they would have a job for life. I couldn't do that, since I might or might not outlive them. I did not state that I would lock the doors before I ever signed with the union. If I made such statements I probably would remember them.

523 I did not contemplate any cut in wages at the Plankinton House. I made the statement to some of the employees that we were not planning to cut wages. I did not tell anybody that we were going to raise them as soon as we could. I may have remarked that it would be very pleasant to raise wages if we could. I don't know whether or not that conversation was for the purpose of inducing the employees not to go out on strike, because I do not remember the conversation. I didn't tell any employee after the strike started that we were going to organize our own union at the Plankinton. I could not bring the check statements back this afternoon since my personal bookkeeper is out of the city.

524 At this point there was a recess from 3:05 p. m. to 3:20 p. m., after which the following proceedings were taken:

Mr. Knoeller: If the Board please, I would like to ask Mr. Wood one question before the day is over in regard to this proposition.

Commissioner Gooding: I think Mr. Goldberg has some more. Will you take the stand, Mr. Wood?

Mr. Goldberg: Yes.

HIRAM O. WOOD

resumed the stand and was examined and testified as follows:

525 Mr. Knoeller (Q.): Mr. Wood, you were asked by Mr. Goldberg a few minutes ago in respect to an alleged payment made by check by you to Mr. Bournak for the purpose of ousting Phil Valley as an officer of Local 122; did you give Mr. Bournak any such check for that purpose?

A. No, sir.

Q. Did you give Mr. Bournak any check at all in 1939?

A. Yes, sir.

Q. For what purpose?

A. To help his campaign fund.

Q. Will you explain it to us, the time and the place, and so forth?

A. He approached me and said he had two or three very desirable people that he wished to elect to some office in the union. I thought he represented Mr. Valley, incidentally, and wanted some help for some printing. I said I'd be glad to help him. I gave him a small check—I have forgotten how much it was—to pay for some printing. As a matter of fact, I think I paid the printing bill, but it was not to oust Mr. Valley.

Q. Was that the usual and customary political demand that is made at the hotel by various groups?

A. We subscribe to all the advertisements in all these union magazines, buy tickets, and we help them along, have always.

Q. Was it in that line of thought that you gave this contribution to Mr. Bournak?

A. Yes, sir.

Q. Have you personally any animosity or antagonism toward Mr. Phil Valley?

A. No, sir.

Q. Did you have any such during the early part of this year?

A. No, sir; I told him——

Q. Have you ever had any animosity toward Mr. Valley?

A. No, sir.

Take the witness.

526 **Examination** (Continued), by Mr. Goldberg.

Since Mr. Goldberg asked me the last question and since Mr. Knoefler just questioned me, we had a recess of about ten or fifteen minutes. I do not recall telling you before the recess that we didn't give Bournak a check for any reason. I recall your asking me if I gave him a check to hurt Valley, and I answered "no." If you asked me whether or not we gave a check to Bournak for any reason, I suppose it to be pertaining to hurting Valley. I did not tell you before the recess that I gave Bournak a check to use in the election.

327 I did not tell you that the check I gave to Bournak was for the purpose that I now tell you it was, since I have been continually told not to volunteer any information. It is not true that I don't want you to have all the information concerning the matters you are asking questions

about. Now that I have refreshed my memory, I do not remember whether the check was payable to cash or whether it was given in the first week in February.

528 My memory was not refreshed as to giving Bournak the check for election purposes. I knew it. I gave Mr. Knoeller the information, because he asked me the question in a way that I could understand. I thought you were asking the questions about the check to hurt Mr. Valley. I did not know that Mr. Bournak was opposing Mr. Valley or that his friends were running against Mr. Valley. I had no feeling in the matter whatsoever as to whether or not Mr. Valley was too active in protecting te employees' interests. I have heard you boast that the hotel contract in the City of Milwaukee is considered the fairest in this industry in the country. I don't recall hearing Mr. Whyte, one of the attorneys that presented this matter at the arbitration, make such statement.

529 I do not recall any other time that I gave a check to any union or union representative for campaign purposes. I did think at the time that it was proper for me, as an employer, to contribute to a union campaign in an election of officers.

530 I have not been asked to contribute to the independent union. I did not think that my contribution of money to be used in the campaign of a union election was improper. I admit that the purposes for which I gave that check was to be used in the campaign of a union in behalf of some party. I have not told anybody since the strike

begun that we don't like Phil Valley. I did not know that Bournak in the campaign for election for which I gave a contribution was trying to undermine and depose Phil Valley. I know that I paid for some advertising for two or three people that Mr. Bournak was very anxious to have elected for some office or other in the union. He didn't specify and I wasn't particularly interested. I was not told that the check of $25 that I contributed, payable to cash, was to pay for a leaflet known as "The Spark." I never heard of it.

531 I do not think that I can produce the check here, since I am under the impression that it is a personal check and my bookkeeper is away on a holiday somewhere in Indiana, and I do not know when she will be back. I admit paying for this advertising.

(Commissioner Gooding, at request of Goldberg, for the respondents, requests witness to bring check and stub if he has it.)

Respondent's Exhibit No. 42 is a list of the Plankinton House employees as of December 1st and also a record of employees as of June 16, which was prepared by the hotel in accordance with the request of subpoena duces tecum. This list includes parking space employees, office employees and assistant managers.

533 I am the only employee that is not included. I did not segregate the employees into separate units such as bartenders, laundry workers, building trades employees or hotel and restaurant workers.

534 When I gave the Labor Board the total figure of employees working at the hotel, I included everything, including parking space employees. When I gave the figures as to employees who were back at work, I likewise included all employees and also included employees who have been hired since the strike began and have taken the place of my boys and girls who were out on the picket line.

I knew that the contract of June 16, 1938, provided that when we were in need of employees I was to call the union for help.

535 Q. Now, during the life of the contract, did you ever hire employees without first applying to the union for help?

A. Yes, sir.

Q. Did you know it was a violation of contract?

A. Yes, sir.

I hired employees without applying to the union in accordance with the terms of the contract because the union is interested in getting work for their members without regard to their ability. I am very much concerned over getting able people, even though later we ask them to join the union. I would not call a bartender who was an apprentice and who had not experience, an able man. I know that we hired such a man without first applying to the Bartenders' Union.

536 I did that because I wished to do it contrary to the terms of the agreement. It is not because I wanted to stack the employment roll with non-union members so that if it was determined that

a vote must be held I would have nonunion people to swell the vote against the union. I do not know that one reason why the union refused to submit to a request for a 75 per cent vote was because I had swelled the roll of nonunion men contrary to the contract. When I engaged this one young man in question, we were not in any altercation with the union over the contract or anything else. I don't think that the dispute with the union started when the renewal came at the time the notices were served.

537 I do not know that our representative stated that no closed shop agreement could be signed unless a vote was had in accordance with the law. It never entered my head until the award was handed down by the arbitration board. I don't know that that was the position taken by the representative of the company or that that was what created the arbitration demand.

The name of Charlie Addis who appears on this list was hired in October, 1938.

538 I did not know that he does not belong to the union yet. Yes, I believe I did, I think he is a student. I did not know that he hasn't been a student since last fall. As the manager of the hotel I instructed the department heads that we had a contract which required everybody to belong to the union and instructed them to see that that term was carried out. I know that we repeatedly sent people to join the union that we engaged. I may have fallen down in one or two places, it is possible. I did not insist that they comply with the contract and hire union members first. I never told them that.

539 I sent my department heads a copy of the contract and told them that people must belong to the union if they worked at the Plankinton House. It was our common practice to call the union first before hiring anyone. Frequently, I did not do it because I responded to some other appeal for work or something of that sort.

540 It was both in response to appeals for work and because I wanted to hire my own type of employees, which caused me to do this. I did not communicate such information to my department heads. I did not know that Mrs. Hehmeyer was opposed to unionization. I told them their waitresses must become members of the union always.

Q. But you didn't insist that your department heads comply with the union contract, namely, that union members—that the union should be called for help when you needed help?

A. I'd like to answer that if I may by saying that I didn't feel inclined always to follow that contract, but that I pretty generally insisted that our department heads do so.

I think that Charles Addis didn't become a member of the union because we thought he was a student. I never checked in to find out that he wasn't. Mrs. Hehmeyer ha contact with him every day. Student help get their meals and some money. Naturally, when they are going to school they can't work, but their time is not limited as to number of hours.

541 (Discussion between Commissioner Gooding, coun-
543 sel for respondent and counsel for complainant as to materiality of pay roll records with respect to

Charles Addis. Board rules not pertinent, to which counsel for respondent takes exception.)

543 **Examination** (resumed): I know that Wayne Banning was employed as a bartender for about six months before the strike began, but I didn't know that he didn't get a bartender's license until September of this year.

544 When I hired Banning I didn't apply to the union for a bartender, because I wanted him to learn the game, and I told Mr. Burgarino that a little later when he became professional enough to act in the capacity of a bartender he would apply for membership in the union.

545 I did not know that under our union contract there is no provision permitting school employees to work. I didn't know that it was the kindness of the union that permitted the boys to work two hours a day for meals. I thought we were doing these boys a favor.

I have read the contract and have told all my employees in a supervisory capacity to read the contract. It didn't make any difference to me that there was no provision in the contract which permitted students to work as busboys.

546 That matter was discussed with the business agent of the union when we signed this contract. Students work as busboys in every hotel in Milwaukee. The point had never been brought up and should not be at this time. The contract provides that all professional busboys shall be members of the union.

I know Walter Simmen, who is the chef at the Plankinton House.

547 As chef it is entirely up to him whether he wants to belong to the union or not.

Harvey Weber is purchasing agent and day and night steward. I do not know whether or not he joined the union. He is a purchasing agent and I don't believe that the contract provides that he must belong to the union. We called him purchasing agent or steward. Stewards do not always do the purchasing, he does. We did not ask him to join the union. Peggy Hehmeyer does not have to belong to the union.

548 William Komes is a head waiter. He doesn't have to belong to the union.

Loretta Sohm is a waitress. It is not possible that she isn't a member of the union. She belongs to the union. Mr. Hoffman is manager of the Plankinton House. O. L. Thoms is the auditor.

549 Cobina Block and Clara Heitman are cashiers. Fred Moser is the night superintendent. His duties are to turn out the lights when they are not necessary, locks the back door and puts the cat out and all those jobs that a fellow does at home. I guess he is a glorified houseman. I doubt if he would be required to be a member of the union, because he has supervisory capacity over the help. That is a matter of opinion. I did not ask him to join the union.

Emily Holzer is assistant housekeeper. I do
550 not know whether she belongs to the union and I did not ask her to join.

Robert Jeske is an assistant agent and steward. I did not know that he didn't belong to the union, nor do I know that the contract requires him to

join. He has been in our employ since the entire period the closed-shop contract was in effect. I know that he was employed from August 19, 1936, to September 29, 1938, at which time he left, and that he was re-employed on October 21, 1939.

In October, 1939, I didn't ask the union for an assistant steward, because I didn't want one that came from the union.

551 I do not know who employed him. I imagine one of our department heads did. In my opinion he would have joined in a few days if you hadn't gone on strike.

552 Thomas James works in the laundry. I think he belongs to the Laundry Drivers' Union.

Mary Skoczas and Gertrude Nusslock are laundry workers.

Thomas Baker is a maintenance man, having to do with machinery and belongs to some union.

Otto Bonse is a repair man. I don't know whether he is a union man.

553 He does furniture repairing, carpenter repairing and that sort of thing.

Dave Ginsburg is a bartender.

Frank Kassimor is a barman, and Elmer Hundt is an outside man having charge of our parking stations all over town. We have one parking station west of the hotel. The one north belongs to the Plankinton Trust. We also have a parking station on Second street and on Plankinton avenue. This is on the premises where Charlie Toy's Building was and goes from Second street through to Plankinton avenue.

554 (Discussion and identification of the various locations of the filling stations.)

555 Alfred Kolka is a parking station boy.

Birdie White is a head waitress.

Mrs. Hehmeyer is maitre d'hotel, head of the food department and in charge of the waitresses.

556 I do not know Vernon Hahn, who has been with us since September 5, 1937. He is a student busboy, as is Edgar Lindenberg.

Grace Guse is a cashier in the Coffee Shop.

557 I know that by the terms of the contract cashiers are supposed to belong to the union and that Cobina Block, Clara Heitman, and Grace Guse are cashiers, are not members of the union and have not been at any time during the life of the contract.

Dorothy Wahlgren and Margaret Vohla are also cashiers.

Merrill Sutherland is a printer. She does our menus. She runs the multigraph.

There are fifty-six names on page 4 of Exhibit 24.

558 I do not know whether or not you would be correct in saying that out of those fifty-six names only four of them were members of the union at the time of the strike.

Elaine Beaudry, Jessie Buderus and Ray Cacation were hired during the strike. We did not ask them if they were union employees.

I do not know in what capacity Julius Cook was hired on September 5, 1939, nor do I know that he is not a member of the union. I don't know whether he was asked if he was a member when he was hired.

Anita Corey who was hired on November 4, 1939, is the wife of Halsey Corey.

559 She came to work during the strike.

I do not know Martin Kottingham, who was hired on September 5, 1939. I don't know who hired these people.

560 Mary Garner is a maid, who was hired on October 10th. I don't know if we applied to the union for a maid before we hired her. The housekeeper did the hiring. I told union officials that I didn't want them to go into the departments not around the hotel. I invited them to see me about any contracts they might want to have with the employees. They never remonstrated with me about it. I asked them not to go through the departments.

561 They understood that I didn't want them to go through. I didn't forbid their going through. I don't remember grabbing Mr. Heisdorf by the arm one day and walking him out of the kitchen. I don't remember ever seeing him in the kitchen. I don't think that I did that. I do not know what
562 position Martin Kottingham had with the hotel since December 5, 1939.

Ray Diel is a houseman, who has been working since November 21, 1939, and who came in during the strike. I did not ask him if he belonged to the union, nor did I call the union for help during the strike.

Harvey Effinberger has been an apprentice in
563 the Industrial Commission since January 23, 1939. He is learning to be a cook. He went out on strike, came back and went out again. I don't know where he is now.

John Flood is a student.

Gerald Glowing was hired during the strike.

It is a safe bet to say that we didn't call the union for any of those hired during the strike period.

Herbert Groenewald, who was employed on October 10, 1939, works on the parking lot.

I believe that George Hacket hired since June 7, 1939, is a student doing busman work. I don't know how many student busmen we have.

564 When I hired student busmen I did not consult the union to find out whether we were having too many of them who displace regular busmen. We have full time busmen working at the hotel.

564-565 (Discussion between Commissioner Gooding and counsel as to possible stipulation to shorten testimony with respect to these exhibits.)

566 Cover.

567 Cover.

568 **HIRAM O. WOOD**

resumed the stand, adversely, being previously duly sworn, was examined and testified as follows:

Examination (continued), by Mr. Goldberg.

(The parties stipulated that the secretary of the union, if called, would testify that of the 56 names appearing on page 4 of Exhibit 24 only four were members of the union, and one a suspended member. It was further stipulated with respect to that part of Exhibit No. 24, which is designated as a list of Hotel Kilbourn employees, that four of the persons thereon named never belonged to

the union, while an additional four persons thereon named commenced employment with the Hotel Kilbourn during the strike and were not members of the union.)

569 I recall that two weeks before the strike we were in need of a houseman at the Plankinton House. I do not recall telling one of our housemen to get another houseman, nor do I remember telling him not to apply to the union, because, even if it were a violation of the contract, the union couldn't find out.

570 I have here the check of which we spoke yesterday. (Check marked "Exhibit No. 43" and introduced in the testimony.) I recognized the signature on the bottom of that check as being my signature. The check is one of the Plankinton House checks, dated February 6, 1939, and is in the sum of $26, payable to the Milwaukee Wochenblat, which company has endorsed it on the back. I know that that company does printing, and this is the check I gave in payment of their printing bill. I gave it to George Bournak.

571 We have an employe by the name of Emily Holzer, who is a curtain hanger at the hotel and has various other duties. I do not believe that she is a member of the union. Supervisors do not come within the contract, and a curtain hanger is a supervisory employee. Her work consists of hanging curtains.

572-582 (This testimony again deals with the question of interstate commerce, and is, therefore, not pertinent to this appeal.)

583 I know Dan San Miguel, the little Filippino boy who worked at the establishment before the strike.

I think his name is Don. I remember seeing him November 26, 1939, about 11 a. m. I spoke to him
584 at that time. I do not remember telling him that I was sick of his picketing in front and that I would bust his head against the wall. I did not threaten to send him back to the Philippine Islands, nor did I threaten him at all.

I followed him down into the dressing room when he went downstairs and spoke to him down there. I don't remember exactly what I said, but while he was removing his working clothes I said: "Perhaps you'll come back to work, or perhaps you'll get another job, and in either event you can have them any time you wish. You can come in again and get them, or you can—we will send them to you, I believe, if you wish us to, but you needn't take them with you today, unless you have other work." I believe that I suggested to him that he should leave his clothes in the locker and go back to work. He left his clothes, but did not go back to work.

585 When I spoke to him near the desk I invited him to stay for dinner. I asked him if he didn't think it was unfair to his two children to stay off the job. I believe I went so far as to suggest that if he needed anything he get in touch with us; and I believe I also suggested that he talk to his fellow countrymen with regard to the situation, because he told me that he was afraid to return to work because too many threats had been made; that he worked nights and was afraid to leave the hotel at midnight, or something like that. I told him that six or seven of his fellow countrymen were back, and he answered that they didn't have

children and a family, and that was why they could stay.

When I offered him food and help the thought that that would influence him in his decision as to his rights to work or not did not go through my mind at all. I suggested that he would have to decide for himself, and turn it over to his countrymen for advice.

586 House detectives, policemen, or watchmen, were hired during the strike, but not by me—by the owners. I do not know their names. They are not listed on Exhibit 24 as employees because I haven't received any bill for their services. The Plankinton House Company is paying for their services. There are two of them, and I do not know whether they carry weapons or not.

587 They are on duty twenty-four hours a day. I suppose they are there to guard the property. I do not consider them employees of the hotel, but guards of the hotel property for the owners who engage them.

I have copies of all the letters I sent to the employees.

588 (Exhibits 47, 48, 49 and 50 marked by reporter.)

Exhibits 47, 48, 49 and 50 are copies of the letters I sent to the employees. Exhibit 47 is dated August 21, 1939, which is before the arbitration award came down. When I sent that letter it did not occur to me that it would interfere with the independent thought of any employees concerning the subject matter discussed, or that it might have the effect of influencing the employees away from the union, or have any effect in influencing

the employees in any way concerning the new contract, nor did those things occur to me when I sent Exhibits 48, 49 or 50.

589 Exhibit 50 was apparently sent shortly after the strike, judging from its wording.

(Exhibits 47 through 50 offered and received.)

On November 12 or 13 I received a letter from the union in reply to the letter which we sent to the employees.

(Exhibit No. 51 marked.)

590 After we received Exhibit 51 from the union we did not send any letters to our employees in reply. I can see from the letter that the union stated it was willing to vote under the auspices of the National Labor Relations Board, and was also willing that we be not bound by such vote.

591 Mr. Goldberg (Q.): Now, state, Mr. Wood, whether or not this letter contains the following in reference to the vote: "In reference to the offer of a vote on the part of the union there is no 'hook' or 'catch' to this proposition. A vote of even one hundred per cent of your employes in favor of the union would not bind you to execute the supplemental agreement and grant the demands of the union. You still have the right legally to refuse to do so. It merely will show to you the wishes of your employes. If favorable to the union, you still are not bound to sign. If any number less than what your attorneys advise you, which in their opinion, is necessary to permit you to continue the closed shop contract, designate the union as their representative, and you, there-

fore, refuse to enter into the agreement, the union still can continue to picket and advertise the controversy in furtherance of such labor dispute." Was that paragraph contained in that letter?

A. You read it perfectly.

Q. Did your hotel offer to enter into a vote?

Mr. Knoeller: Now, that is objected to now on several grounds: First of all, if it is offered in the nature of a compromise, it isn't competent. And, secondly, it is merely a self-serving declaration on the part of Phil Valley.

Mr. Goldberg: If your Honor pleas , we are before a Labor Board who is interested in all efforts made to mediate and settle a dispute. An offer
592 was made, and the employer did not avail himself of it, didn't even show the courtesy to the union to reply to that letter.

Commissioner Gooding: Well, he has testified that he didn't reply to the letter, and I think that is sufficient. I will sustain the objection.

(Exhibit 51 introduced and received.)

I do not know whether or not a representative of the United States Government, the Department of Labor, contacted officials of the Plankinton House Company and offered their efforts to mediate the dispute.

593 Q. Did you hear that a Mr. Luecki had conferred with your Mr. Richardson and Mr. Robertson, or either of them, concerning an attempt to get a conference between the union representatives and your hotel representatives concerning this strike?

Mr. Knoeller: That is objected to as being irrelevant, incompetent and immaterial.

Commissioner Gooding: Objection sustained.

I have seen Exhibit No. 52 before, but it was neither printed nor mimeographed and distrib-
594 uted by our company. Somebody had this done and made us a present of a few copies, which we distributed. It was not printed by the hotel, and I do not believe it was printed by the Hotel Association. I believe that one of the Milwaukee hotels had it done, that is, one of the five that the union had negotiation trouble with. I suspect that it was the Wisconsin Hotel. We put a few on the desk for anybody who was interested enough to read it. I don't know whether the employees read it. It wasn't available to them. It was on our desk and perhaps some of them saw it.

595 (Exhibit No. 52 is offered and received in evidence, this being a reproduction of an editorial appearing on the editorial page of the Milwaukee Journal November 4, 1939.)

EMMET L. RICHARDSON,

called as a witness, adversely, on behalf of the respondents, having been first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Goldberg.

My name is Emmet L. Richardson. I am the president of the Plankinton House Company. I am not a stockholder except for one qualifying share.

596 I do not form the labor policies of the company

except in a rather remote way. I admit ultimate responsibility for any policy we have. I hardly know what you refer to when you refer to labor policies. The company has asked for a revision and elimination of the closed shop clause in the contract at the Plankinton House. It was willing to give the employees a week's vacation with pay. I think that the company was willing to agree to the revision in language of the "seventeen rooms or equivalent" for a day's work for maids. Mr. Wood would be more familiar with that detail. I did not hear Mr. Wood say the other day that he was not present at the negotiations, and that there was not reported back to him what the representatives agreed upon.

597 (It was stipulated that the parties had agreed on a revision of what constitutes a maid's work.)

598 I am not thoroughly informed, but I don't think that the revisions requested, for the hotel to provide uniforms to pantry girls, would have been a great burden upon the hotel. I would consider it a minor item of expenditure during the course of the year, but my judgment is not final.

599 In my opinion the cost of furnishing of uniforms would be a minor item of expense; that if you took it alone it would not be sufficient to induce the hotel company not to include such revision in the contract for the period commencing June 16, 1939, nor would the vacations with pay and the revisions in the definitions of what constitutes a maid's work be sufficient to induce the company to submit to a strike rather than include such

terms in the revisions of the contract for the year 1939.

600 (It was stipulated that the union's request to change its male employees' working hours from 9 to 8 was withdrawn.)

I understood that if the Plankinton House Company signed the supplemental agreement that the other hotels signed that there would be no necessity for a strike, and that the union would be satisfied.

601 I have seen a copy of the supplemental contract. We do not consider the signing of the supplemental agreement favorably. I do not know what motivated the union or why they asked for arbitration. I was not advised that the arbitration was requested by the union because the representatives of the hotel would not agree to any revisions unless they contained an open shop.

602 I was not advised, nor do I know it to be a fact, that the arbitration was necessary and demanded by the union because in addition to the open shop our representatives, along with those of the other hotels, namely, the Wisconsin, Medford and Eastway, insisted that the contract be revised by including an ineffectual seniority clause. I was not advised that the representatives of the hotel insisted that the revisions contained, in addition to the open shop and in addition to the ineffectual seniority clause, a provision which would take away from the union the right to dispute discharges, whether such discharges were with or without cause. I know that a reclassification of

the hotels was one of the points that we asked to have arbitrated.

603 I do not know that our representatives refused to sign a revision of any terms in the contract unless the union agreed to include such reclassification, with the resulting lowering of pay. I was not so informed. I did not know the details of the reclassification. I knew that a classification of the hotels seemed to be a fair way of approaching the wage situation. I did not know that the hotels in classification four were paying their employees $3.00 per week less than employees received from the same work in the same jobs for hotels in class one. I knew that some adjustment of expenses would follow a reclassification of the hotels.

604 I engaged Mr. Robertson as the attorney for the company, and gave him instructions in a general way as to the limits and duties concerning negotiations with the union. I asked him to keep in touch with me concerning those negotiations. I have seen the typewritten requests that were made by the hotels, and I knew that those things which I have just been questioned about were the demands of the hotel upon the union, but not in detail. I did not know that by insisting on such demands results would be as you have questioned about.

Q. Now, if you had known that would you have instructed Mr. Robertson to drop those demands?

605 Mr. Knoeller: Now, just a minute. That is objected to as being irrelevant, incompetent and immaterial to the issues in this case.

Mr. Goldberg: We might settle the dispute here if he answers correctly.

Commissioner Gooding: I don't think that is material. The objection is sustained.

(Discussion between counsel and Commissioner Gooding.)

606 **JOHN W. POLCYN,**

called as a witness on behalf of the respondents, having been first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Goldberg.

My name is John W. Polcyn. I am captain of police of the Milwaukee Police Department, and as such captain have charge of the investigations concerning matters pertaining to strikes.

607 On November 17th, about midnight, I had a report from patrol sergeant, Stanley Stackursky, that at about 12, midnight, on that date some one threw out a can of tomato juice on the Plankinton side of the hotel, apparently from the fourth floor window. The report indicates that it was thrown out towards where the pickets were walking, but that it did not strike anyone. The sergeant investigated in the hotel, but was unable to find the party.

608 (Discussion between counsel and Commissioner Gooding with respect to the relevancy of above testimony. Objection of complainants overruled.)

609 This is the only official report I have in my files with respect to this can of tomatoes.

610 We have a record of about eight or nine arrests

at the Plankinton House. Our investigation shows that one Leo Makoski, aged 25, residing at 787 North Marshall street, came out of the Plankinton building at 6 a. m. November 22, 1939, and stole a picket sign which was leaning against a building at the alley. He took such sign to an adjacent parking lot, where he proceeded to destroy it. He was arrested, found guilty of disorderly conduct, and fined $5.00 and costs, on November 22, 1939. My record shows that Makoski was accompanied by Charles Addis.
611 The case against him was dismissed. The record shows that these two came out of the hotel together.

Cross-Examination, by Mr. Knoeller.

The can of tomatoes was a closed can. The complete list of disturbances as reported to me are as follows:

"On November 4, 1939, at 3:10 p. m., patrolman Henry Neahrbass arrested Charles McLaughlin, charged with disorderly conduct.

612 "Also arrested and charged with disorderly conduct was John Heisdorf, 1020 North Fifteenth street. Both of these men were picketing the Plankinton Hotel on the Michigan street side. Both struck at Joseph Mueller, an employee of August Kellner, florist, 3258 North Humboldt avenue, who was delivering flowers to the hotel, and knocked a bundle of flowers to the pavement. Both were arrested and taken to court November 6, 1939. The cases were adjourned to November 17, 1939, on which date McLaughlin was fined

$10.00 and costs. The case of Heisdorf was adjourned until December 18, 1930. Twenty pickets were in the line at that time.

613 "On November 7, 1939, at 9:40 a. m., Paul Ziebell, 922 West Highland avenue, an employee of the Plankinton Hotel, was struck in the face by a picket, James O'Brien, who was picketing the Michigan entrance of the Plankinton Hotel. While passing the entrance he handed a picket sign to another picket in line, and, without warning, walked up to Paul Ziebell, who was standing in the doorway of said hotel, and struck him in the face. He was placed under arrest by patrolman Julius Mavis in District Court on November 7, 1939. Case was adjourned to November 17, 1939, on which date he was found guilty and fined $5.00 and costs.

"November 14, 1939, at about 2:30 p. m., Edward Knopf, 3555 North Eleventh street, an employee of the Plankinton Hotel, was kicked on the right leg by one Thomas O'Mahar, a picket at the hotel, residing at 602 East Juneau avenue. The said Thomas O'Mahar was placed under arrest by patrolman Charles Henrich of the Sixth Police District, taken to court November 15th; case adjourned until December 18th.

"On November 17, 1939, 11:20 a. m., while a delivery of salt was being made by the employees of the Morton Salt Company and Lester Raasch, an employee of the Plankinton Hotel, was carrying a bag of salt into the Plankinton Hotel, he was assaulted by Charles McLaughlin, 935 North Tenth street, and Mr. McLaughlin was arrested by patrolman William Schaetsel, taken to District Court and fined $25.00 and costs.

"On November 17, 1939, at 3:35 p. m., Rudolph Stano, a bellboy employed at the Plankinton Hotel, was placing some packages in an automo-
614 bile belonging to one of the guests of the hotel, and while so doing one Joseph Hofich, a picket, jumped out of the picket line without any warning, and jumped onto the back of the bellboy, commenced to assault him. He was arrested by patrolman Carl Koehler. Case was taken to court November 18, and adjourned to December 6th, on which day he was filed $5.00 and costs.

"On November 17, 1939, about 5 p. m., Thomas James, an employee of the Plankinton Hotel, was assaulted by a picket, Larry McAllan, who, without any warning, jumped on the back of Thomas James and struck him and knocked him down, and proceeded to kick and strike him until the horse-mounted patrolman, Clem Stapleford, interceded and placed him under arrest. Taken to District Court November 20, 1939; adjourned to December 6, 1939, on which date he was fined $5.00 and costs. * * *"

That completes the record, except for another disinterested person apparently arrested on November 27th or November 14th, by the name of Charles Stock, who was drunk and disorderly. He apparently has no connection with one place or the other.

There were several telephone reports by guests and others, who did not specify who they were, that they resented the booing.

Mr. Goldberg: Just a minute. I object to any reference to testimony of guests calling in, because that is hearsay. There is no telling

615 whether Mr. Knoeller or Mr. Richardson, or I, or some one else called in, and said, "We are a guest of the Hotel." That is of the rankest hearsay. I move that that be stricken.

Commissioner Gooding: It isn't proof of the fact that there was any booing or hissing, but it is proof that somebody called. Merely that there were reports made doesn't prove that there was hissing and booing, but the police were called. That is all this evidence is brought in for.

CAPTAIN POLCYN

resumed:

I received a report from the Chamber of Commerce that there was some booing at the hotel when students from some university were visiting at the Plankinton Hotel, but that was small, more of a general occurrence.

Redirect Examination, by Mr. Goldberg.

The police force has six men at the Plankinton House twenty-four hours a day.

616 They are stationed at different places where the picket lines are. Our department has been able to maintain order on the picket line very, very adequately. I think we have the situation well in hand. It is hard for me to answer whether the seven or eight arrests, commencing November 2nd, to date, which is December 13th, in view of the fact that picketing is going on for twenty-four hours a day, is a fine record from the viewpoint of maintaining order on the picket line. We have had strikes where there were more arrests, and we have had strikes where there were less.

"It seems that sometimes at the beginning of a strike, sometimes when certain people are not very familiar or get excited they become—make mistakes and then later they are—they realize the consequences, and they behave themselves."

617 As far as the pickets on the outside, they conduct themselves very orderly, outside of those instances. I wouldn't say that that was a small number of instances or disorders. It is a hard thing for me to answer that as to the amount.

Recross-Examination, by Mr. Knoeller.

We had six men stationed about the Plankinton Hotel from the very start of the strike on November 2, 1939. The men on horseback are just routines. They just patrol that district and check traffic conditions. As a matter of precaution, on several occasions when a delivery was to be made to the hotel, we sent more policemen down there.

618 We would just simply borrow the men from the Kilbourn Hotel, or from the Wisconsin, and sent three or four additional.

619 **DAN SAN MIGUEL,**

called as a witness on behalf of the respondent, having been first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Goldberg.

My name is Dan San Miguel. I live at 204 North Fifth street and was an employee of the Plankinton Hotel before the strike. I am a member of the union and am out on strike. I was here in court this morning when Mr. Wood was on the

stand and when you questioned him about conversations with me on November 26, 1939.

620 At 11 o'clock in the morning of that day I went into the hotel. Mr. Wood was at the desk. He told me that he was sick of seeing me on the picket line, and he told me again that he was going to bust my head against the wall, and the last phrase he told me was that he was going to send me back to the Philippine Islands. When I came into the hotel I told him that I wanted to get my working clothes, and then he made the statements above.

621 I didn't do anything. He sent me downstairs with the house detective. He followed me downstairs and told me to leave the clothes and come back to work. I left my clothes, but didn't come back to work, and am still out on strike.

Cross-Examination, by Mr. Knoeller.

I am married and have two children. I worked at the Plankinton Hotel over a year.

622 Before the strike there was a friendly feeling between Mr. Wood and myself. Everything was all right. He never threatened me and we never had any argument. He didn't give me things to eat; I worked for it. He helped my family along.

I am now a member in good standing in the union. When I entered the hotel I didn't tell Mr. Wood, or anybody else, that I was leaving the picket line to go into the hotel. I was off the picket line and another Philippino went in, so I followed him to get my working clothes.

623 The other Philippino went back to work. My

purpose in going inside was to take my working clothes and find out long the strike would be on. I did not want to go back to work under the conditions of a dispute between the union and the hotel. I wouldn't go back to work for a scab. When the trouble is over I wouldn't mind going back. I knew that all my other Philippine boy friends had gone back to work. I did not go back to work because in case the union wins the case then I will be blacklisted, and then there will be no place for me to work.

624 When I was working I had broken hours between 3 and 6. I worked in the evening, too. I had a split shift. Many times I would leave work about midnight. The other Philippino boys who went back to work about a week ago stay in the hotel. I told Mr. Wood that I couldn't say in the hotel, because I had a wife and children to see every night. I told him that in case I go back to work it means I am going to turn down my organization and anything might happen. I did not mean that I might be attacked.

625 I did say to Mr. Wood that I feared for my safety walking home at night.

Redirect Examination, by Mr. Goldberg.

Nobody connected with the union threatened to beat me up if I went back to work.

Examination by Commissioner Gooding.

I told Mr. Wood that in case I turned the union down anything might happen and somebody might hit me or start trouble.

626 I told Mr. Wood this after he told me that he was sick of seeing me on the picket line and would bust my head against the wall. It was after I went down to my locker that I talked about being afraid about what might happen to me. The talk between Mr. Wood and myself in the locker room was very friendly. When we walked upstairs he just bawled me out. He didn't give me a chance to explain or say something.

Recross-Examination, by Mr. Knoeller.

Mr. Wood told me that in case my wife and children were in need of anything I should get in touch with him and he would be glad to help me out.

Redirect Examination, by Mr. Goldberg.

627– Rufus Costello, a Philippino boy who worked at
630 the hotel before the strike, is still striking.

EMMET L. RICHARDSON,

recalled as a witness, adversely, on behalf of the respondents, being previously duly sworn, was examined and testified as follows:

(It was stipulated by the parties that after the hearing is closed there will be given to the Board a copy of all the exhibits that were made a part of the arbitration proceedings. There was also introduced into evidence Exhibit 53, being the classification of the hotels, and Exhibit 54, being the minutes of the negotiations. It was stipulated also that Exhibit 55 would be intro-

duced and received, this being a copy of the supplemental agreement between the unions and the hotels, which was signed by the majority of the hotels.)

631 (It was stipulated that the hotel refused to sign the supplemental agreement, being Respondent's Exhibit No. 55.)

I was present when Exhibit 31; the memorandum of recognition between the independent and the hotel was signed. This was on December 1,
632 1939. I did not advise the representatives of the Independent Union that three A. F. of L. unions claimed contract rights because they did not elect to terminate the agreement of June 16, 1939.

633 Exhibit 13, being the letter from Phil Valley, was sent to my office by Mr. Wood three days before we signed the memorandum with the Independent Union. I had no discussion with the representatives of the Independent about the contract or the strike. On November 30 I advised Mr. Cory, president of the Independent Union, that the hotel would deal with the union only if it represented all the employees, including the parking station employees. I told him that the voting unit, in my opinion, consisted of those working at the hotel and the Kilbourn and in the parking places.

634 I did not read the law to him. I told him that was my idea of my ability to recognize any new group; that it would have to be a majority of the employees, including parking station employees. I did not tell him about certain defined units

under which I had signed agreements with unions before.

At the time I signed Exhibit 31 I had also received reports that local 122 had filed a petition with the National Labor Relations Board. I did not mention this to Mr. Cory. My interview with him was confined to checking his membership with our pay roll employees. I did not know that Mr. Wood was not hiring new employees in accordance with the terms of the contract dated June 16, 1939.

635 I heard Mr. Wood testify that he did not hire the guards at the Plankinton Hotel. I authorized Mr. Robertson to hire them. I understood that they were not hired from any agency. One of them is named Otis Gomillion. The other is
636 Edward Arnold. I do not know if these gentlemen are licensed to do such work by the State of Wisconsin, and I don't know that the work they are doing requires a license.

(Section 348.472 of the Wisconsin Statutes, relating to the use of unauthorized persons as officers, offered into evidence.)

637 I know nothing about these men being detectives, and I do not know whether Mr. Robertson investigated that. They were first hired on November 24th. We did not have any guards at the hotel before November 24th to my knowledge.

638 I met with an individual by the name of Luecki, who told me that he is associated with the Department of Labor of the United States Government, and that he acts as a conciliator or medi-

ator in labor matters. He told me he was acting as such in the Waukesha Motor dispute at the time he conferred with me. He tried to arrange for a conference between the representatives of the union and the hotel to discuss the possible settlement of the strike. We refused to hold such a conference.

639. We did not refuse to hold a meeting, but I told him that, as I understood it, there was just one point involved, and that apparently neither the unions nor the hotels could compromise without one side or the other yielding the entire point. It wasn't that there were six or eight different points, where one might give on one side and the other give something else, and so reach a common ground. With one point involved I didn't see where anything that could be called a compromise was possible. I told him that the matter was before the Wisconsin Labor Board. I told him I would refer this to Mr. Robertson, our attorney, but I did not decline to meet with the union's representatives.

He conferred with Mr. Robertson. I was present at part of the interview, and I have no recol-
640 lection of Mr. Luecki asking for a conference or any refusal to hold a conference, or any consent to hold a conference while I was there.

I remember his telling me, or I got that impression, that the union was willing to sit down in any conference at any time to try to settle the dispute. No conference resulted or was had to this day. I told him that it was very difficult while we were the object of a strike to sit down and calmly confer about things.

Q. Are you willing to sit down and confer at this time, and try to negotiate a settlement of the strike?

Mr. Knoeller: That is objected to as being irrelevant, incompetent and immaterial, not within the issues of this case at the present time.

Commissioner Gooding: Sustained.

641-642 (Discussion between counsel and Commissioner Gooding, at which it was stated by Mr. Robertson that he told Mr. Luecki that the only dispute, as far as the hotels were concerned, was a clear-cut dispute on the issue of closed shop under the terms of the arbitration award; that the union indicated that it was very firm in its position, and that the hotels were very firm in their position, and, accordingly, he didn't see that there was any purpose to be served by a meeting. Mr. Knoeller stipulated that that was substantially the position of the hotel, so that it would not be necessary for Mr. Robertson to take the witness stand.)

Mr. Richardson Re-Examined, by Mr. Knoeller.

Mr. Gomillion and Mr. Arnold were employed on November 24, 1939, primarily because of the spilling of what is called a stink bomb on the third floor of the hotel the preceding Sunday. We had considered it for some time, and I was not favorably inclined to employing anyone to protect the property, but after that happened I did two things: I took out strike insurance, and authorized Mr. Robertson to get someone to be inside the hotel and protect our furnishings and the property generally.

I have examined Exhibits Nos. 5 and 6, one being the Union Revisions Requested, and the other being the Hotel Revisions Requested.

643 When I testified this morning in response to the question as to whether or not I agreed to the various demands of the unions, either entirely or partially, that testimony was subject to the provision that the unions would likewise agree and consider the proposed revisions of the hotels as set forth in Exhibit No. 6. I did not mean that we would accept all of their suggestions without having ours granted.

HIRAM O. WOOD,

recalled as a witness herein, adversely, on behalf of the respondents, having been previously duly sworn, on oath was examined and testified as follows:

Examination, by Mr. Goldberg.

643-653 (Testimony with respect to interstate commerce operations of the hotel omitted because not pertinent to this appeal.)

OTIS GOMILLION,

called as a witness on behalf of the respondents, having been first duly sworn, on oath testified as follows:

I am a private detective and a special investigator. Since June 28 of this year I have been affiliated with the Russell Protective Corporation. I am licensed to act as a private detective by the State of Wisconsin. I know Edward Alfred. He

654 works with Russell. I am not here all the time. I am in Waukesha County part of the time, and other counties. I do not know whether Mr. Alfred is individually licensed or not, but I know that I am and I know that the agency is.

Cross-Examination, by Mr. Knoeller.

I was employed to protect the property at the Plankinton Hotel by Mr. Clark Robertson.

655 I am not positive of the date. I think it was Friday, November 24. That was the last week in November. When I was employed Mr. Robertson told me what my duties were and gave me instructions. He did not tell me I had to do any detective work. The duties were to go into the hotel and remain there and try to see that no one was wandering around the hotel and did damage. He told me that there had been stink bombs or some acid thrown, and that he would like to have us remain there until things were settled again, and see that no one was around the hotel that didn't belong in there and wasn't a guest.

Redirect Examination, by Mr. Goldberg.

In my employment I am trying to protect the personal property inside the Plankinton Hotel. I do not carry any arms, any billy or black-jack. I have a room on the fifth floor, where I keep a revolver for use when I am on officer's duty. I do not carry it around the hotel.

656 I do not know Edna Barrett. (Edna Barrett stands up.) I did not see her around the picket line at the Plankinton Hotel shortly after the

strike began because I wasn't there until the 24th, or the last Friday in November. I did not visit there before then.

657 I have never spoken to anyone outside of the hotel, except to Mr. Valley one night. I saw him near the Plankinton in the alley. I have spoken to no picket whatever since I have been there. I am positive that I did not make any statement that the hotel had six million dollars to spend, and the pickets would be outside till the worms ate their bones.

Recross-Examination, by Mr. Knoeller.

I am an officer with a power of Sheriff of the Thirteenth Judicial Circuit of Wisconsin under a Circuit Court order of Judge C. M. Davison, to continue as such until the Presiding Judge deems it necessary to discontinue. As such judicial officer I obtained this revolver.

658 I took the revolver down to Elkhorn last week while I was doing regular routine police work. I brought it back to the hotel, and it has not been out of my room since the night I took it up there after I arrived from Waukesha. I saw a broken window at the Plankinton Hotel at the northwest corner of the building, about thirty feet in from the alley. That is not where I saw Mr. Phil Valley.

Redirect Examination, by Mr. Goldberg.

The commission I speak of is in connection with the grand jury investigation in Waukesha as a special investigator for that county.

ROY DUNHAM,

called as a witness on behalf of the respondent, having been first duly sworn, on oath testified as follows:

659 **Direct Examination,** by Mr. Goldberg.

My name is Roy Dunham. I am a member of Local 122. I was put on as picket captain of the line at the Plankinton Hotel. About 6 o'clock one morning two fellows came out of the hotel and ran away with a picket sign. I learned later that one's name was Leo Makoski and the other was Charlie Addis. As they went around the corner of the building one grabbed the sign. The other one grabbed hold of the sign and tore off a strip.
660 They ran down the parking lot and finished wrecking the sign. The one who tore off part of the sign is the one who was not fined by the Judge. The one who ran off with the sign and broke it up was fined $5.00.

Cross-Examination, by Mr. Knoeller.

I am not a former employee of the Plankinton Hotel, but am a member of Local 122. I have been a member for seven months. My profession is not captain of picket lines. This is the first time that I acted as a picket captain. I am friendly disposed to the union. I would resolve any doubts in their favor. When Mr. Addis and Mr. Makoski
661 left the hotel I was in the alley. This was about 6 o'clock in the morning. Mr. John Verbos was with me, and we were about twenty-five feet from the corner of the building when they grabbed the

sign. I don't know how far north of Michigan street sidewalk I was. I was clear down almost to the other end of the building. I was about twenty-five feet from the northwest corner of the
662 Plankinton Hotel, in the alley. We were standing quite aways from a projecting platform trying to keep out of the wind and keep warm. We were not on the parking lot. We were not on the premises of the building, nor were we on the delivery platform inside the delivery door, or in the middle of the alley. We were standing next to a projecting piece of the building. I did not have a picket sign in my hand. The sign belonged to one of the pickets that was off on relief for lunch. The bottom of the sign was in the alley and it was
663 leaning up against the building. The sign is made of cardboard and wood. The handle being about three feet long, and the sign is about two or two and one-half feet square. I don't know the value of it. We did not see Mr. Makoski and Mr. Addis leave the hotel. When I first saw them they were coming down the alley. from Michigan street,
664 walking northward. It was light enough for us to see what was going on. I didn't see who it was until they got within thirty feet. Near the southwest corner of the Plankinton Hotel there is a little office where policemen congregate, and there were some policemen in the office at that time. They were in plain view of anybody who walked down the alley. I did not say anything to Makoski or Addis, and they said nothing to me.
665 During all the time this was going on I remained on the west side of the building. I saw the police-

men later come across the parking lot with Mr. Makoski and Mr. Addis. He had one on each arm. As they walked by us we walked kind of outwards and followed with our eyes. As they came to the alley this one fellow reached down and grabbed the sign and they started running around the corner, and just as they went around the corner this other fellow grabbed part of the sign and tore it off. I couldn't say what happened after the boys turned around the corner of the north end of the building. We didn't have to come around the north end of the building be-
666 cause the officer was leading them back. Mr. Addis and Mr. Makoski were not joking, smiling and laughing at the time Mr. Makoski walked over for the sign. I was not present when the officers interviewed them.

Redirect Examination, by Mr. Goldberg.

I was in court when Addis and Makoski testified that they came out of the hotel.

Recross-Examination, by Mr. Knoeller.

667 I was not present when the officers told Mr. Addis that they had nothing against him and that he could go. I was in court and testified against Mr. Makoski and Mr. Addis. I was present when the Court dismissed charges against Mr. Addis. Mr. Verbos swore out the warrant for Mr. Addis.

Redirect Examination, by Mr. Goldberg.

I believe the police officer said that he didn't see Addis tear off the sign and therefore he could not arrest him.

FRANK STACHOWIAK,

called as a witness on behalf of the respondent, having been first duly sworn, on oath testified as follows:

668– Testimony omitted because it relates to the in-
676 terstate activities of the hotel, which are not pertinent on this appeal.

676 **ROBERT KNOOP,**

called as a witness on behalf of the respondent, having been first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Goldberg.

My name is Robert Knoop. I live at 3258 North
677 Green Bay avenue. I am married, but have no children. Before the strike I was a member of Local 122, and was employed at the Plankinton Hotel. I am now out on a strike. I worked the first night of the strike. On November 3rd, about 5 p. m., I reported back to work at the Plankinton Hotel, where I worked as a bell man. When I came in I saw Mr. Wood in the lobby and told him I would like to go back to work. He said that was fine, and that my job would be good for life
678 if I do. That night I went to the Kilbourn Hotel, where I worked. After going home I decided I wanted to see Mr. Valley and tell him I was

going out on the picket line. I then went back to the hotel and told Mr. Wood that I was going out on the picket line. Mr. Richardson was then
679 with him. They asked me to stay at the hotel, and bring my wife down, and live right in the hotel. They said they wouldn't sign with the union even if they had to lock the doors. They said that if they did lock the doors, they would take me down to Chicago and get me a job there. I did not go to work, but went out on the picket line.

Cross-Examination, by Mr. Knoeller.

I know Mr. Richardson. It is possible that it was Mr. Van Houten instead of Mr. Richardson who was present when Mr. Wood and I were
680 talking. At the time that I spoke to Mr. Wood there was no discussion with regard to the safety of the employes who remained at work. My wife and I did not come down to the hotel. We were not considering the security of her person at home while I was at the hotel. I didn't sleep at the hotel when I did work there. I didn't discuss my personal safety with Mr. Wood.

Redirect Examination, by Mr. Goldberg.

I voluntarily testified here this afternoon of my
681 own free will and accord.

681 **Recross-Examination**, by Mr. Knoeller.

I am not here under subpoena.

MARGARET THIE,

called as a witness on behalf of the respondents, having been first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Goldberg.

My regular occupation is that of a waitress. I worked at the Plankinton House for over five
682 years, and am a member of the union. Mrs. Peggy Hehmeyer told the girls that she didn't believe the union could do anything for us, and that if we had any request to make, we should go to Mr.
683 Wood. She didn't say what he would do for us. A short while ago a notice was posted in the girls' dressing room. I don't know how Miss Hehmeyer found out about it, but she questioned us all individually to find out if we put it there or knew who did. She seemed quite angry. I heard her question the other girls. I knew that she accused two girls of posting it. Helen Martel, a waitress, was one of the girls who was accused of doing it. Before this Mrs. Martel did not work Saturdays or Sundays, but after she was accused of posting the notice she was put to work
684 on Saturday and Sunday. After that Mrs. Martel quit. Mrs. Hehmeyer told us that if we stick with Phil Valley we were crazy, and that we should stick with Mr. Wood. After the strike, and on or about the 17th of November, I went back to the hotel to clean up my locker. I spoke
685 to Peggy on that day. She told us we were fools for staying outside, and sticking with Phil Valley. That he was a gangster and a racketeer, and had changed his name three times. That we were

more or less branded for being outside, and that we would have a hard time finding another job. That we were branded as trouble-makers, and that the girls who stayed inside would naturally get the cream of the crop after everything was going in full swing. They would have a lifetime job, and that before I left the building I should look at the bulletin board where there was some sort of an agreement guaranteeing the girls a lifetime job.

Cross-Examination, by Mr. Knoeller.

I didn't take time to look at the bulletin board to see if there was a contract, because there were quite a number of girls there. I don't know whether there was like that posted on the bulletin board.

RUTH FAIRWEATHER,

called as a witness on behalf of the respondents, having been first duly sworn, on oath testified as follows:

686 I live at 2220 West Wisconsin avenue and am a waitress at the Plankinton Hotel. I was employed there for five months before the strike. I am a member of Local 122 and am out on strike. I had a telephone conversation with Mrs. Hehmeyer about going back to work, after which I went back to the hotel. I spoke to Mrs. Hehmeyer and Mr.
687 Wood. Mrs. Hehmeyer told me that it was entirely up to me and I could use my own judgment about that. Mr. Wood said the pickets were a bunch of fools and he couldn't understand why

they were doing it. He said they didn't have to worry very much, because the other hotels were backing him and Mr. Schroeder was sending him food by parcel post. I told Mrs. Hehmeyer that if I came back I would lose my seniority rights in
688 the union. Mr. Wood said they were forming their own independent union, and that they were taking out an injunction very shortly which would protect the ones on the inside. Mrs. Hehmeyer also said that she would inform the girls and men on the outside when this independent union did take place as to whether to come back or not. I was told that if I wanted to come back I would be taken care of, and I would be given a room, and I wouldn't have anything to worry about.

Cross-Examination, by Mr. Knoeller.

I did not fear for my own safety and that is not why I did not go back to work. My husband said that he would rather I did not go back, that he would rather I stayed out.

AL GAMBY,

called as a witness on behalf of the respondents, having been previously duly sworn, on oath testified as follows:

689 I am the president of Local 122. As such officer I take a general tour from hotel to hotel to see that the pickets are behaving themselves, to give instructions to the picket captain, to see that the picket line is conducted orderly. As president I am also the chairman of the executive board.

The board reprimanded Jack Heisdorf, Chuck McLaughlin and Joe Hofich because of their conduct arising out of strike activities and for getting into trouble. The board ordered that if anyone out there gets into trouble to take them right off the line or supervision of the line. Chuck
690 McLaughlin is no longer on the picket line, because he was arrested after we gave him one chance. I was on the picket line when, out of the clear sky, a can of tomatoes came down from the building, hit the sidewalk and rolled to the street. It landed halfway between where I was standing and the edge of the walk about eighteen or twenty inches from the building line. This was on the
691 sidewalk in front of the Plankinton entrance, opposite Gimbels. I picked the can up and gave it to the officer and told him that was what they were throwing out. The officer took it from me and said that he would have to turn it into the sergeant. The can was all dented. The officer did not go into the hotel at that time. I removed
692 Thomas O'Brien from the picket line when he got in trouble, because he had no business on the line. Before that time I did not know that he was on the line. At that time I also found out that he was not a union member. The executive board issued orders that after that that no one goes on the line who isn't a union member. I know someone was removed from the picket line because he
693 was drunk, but I do not know who it was and I did not remove him.

Cross-Examination, by Mr. Knoeller.

The orders that I refer to are oral. There was nothing reduced to writing. McLaughlin never was on a picket line. He was a captain until he got
694 into trouble. I was not in court when McLaughlin was tried for his acts of violence. People who do picketing duty are paid by the hour, once or twice
695 a week. I visit these different strike-bound plants or restaurants whenever I have time. I don't know offhand how many times I had been to the Plank-
696 inton Hotel. I don't know how many times I visited the Plankinton Hotel between November 2nd and November 7th. I know that it was more
697 than once. I never saw O'Brien in the picket line. Mr. Alexander keeps a record of those who are on the picket lines day after day. He is not an officer of the union; he is captain of the strike committee, appointed by Mr. Valley with the approval of the executive board. I never examined the records of the union as to who was doing picket duty from time to time. We have over 3,000 members in our organization, and I do not know all of
698 them. I don't know that O'Brien was on the picket line from November 2nd to November 7th. I think the only time the organization paid him was once. We do not inquire into the past history of the men that we place on the picket line, or with respect to their criminal records. I don't remember the day that the tomato can incident occurred, but I know it was between 9 and 10 in
699 the evening on a cold day. At the time the can came down I was standing right at the edge of the canopy towards the building talking to the officer.

I had been there a couple of minutes, and the first time I saw the can was as it struck the ground.
700 I know the can came from up above, but I didn't
701 see anybody throw it. I had no idea who threw the can, and I wanted the officer to make an investigation.

JOHN HEISDORF,

recalled as witness on behalf of the respondents, having been previously first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Goldberg.

703 I remember being on the picket line at the Plankinton Hotel when on two different occasions water came down from above. On about the second Sunday of the strike as I was standing at the Michigan street entrance talking to the officer on duty, while six pickets were parading up and down, when some water was splashed on the sidewalk. When I called this to the attention of the officer, he looked up if he could see any open window but stated he could see none. Six or seven minutes later two passersby had water splashed on them from the windows of the hotel.
704 The officer went into the hotel and made an examination of all of the rooms on the top floor but could find nobody. I made no report of this.

In February of this year I was elected vice-president of the union, which makes me also an assistant to Phil Valley. As his assistant, the Plankinton Hotel is within my jurisdiction.

Early this year I had occasion to go into the

hotel at about 10:30 in the morning. I had re-
705 ceived a complaint from an employee that some people were working in the kitchen who did not belong to the union. I went over to the hotel and into the kitchen for the purpose of asking questions. Mr. Wood came in, took me by the arm and persuaded me to get out of the kitchen. He told me that he didn't want me walking around through the hotel and that if I had any business to transact I was to transact it with him. He said that he didn't want Alexander around, either, and that Bournak had made arrangements with him that business agents were not to go into the hotel, but to do all their business with Mr. Wood. This occurred shortly after the check incident. I told him I had received reports that several peo-
706 ple working in the kitchen did not belong to the union. He stated that he would investigate, but I haven't heard anything more about it.

I remember that at the time that the cans of ice were tipped over, two of the colored girl pickets were on the sidewalk of the hotel. When the car pulled up to deliver the ice, I asked the fellows who were in the car that as long as there was a picket line at the hotel wouldn't they please take the ice back to the company and not deliver
707 it. As we were talking, seven or eight boys came out of the hotel with their uniform coats off and their sleeves rolled up and broke through the picket line, knocking down two of the colored
708 lady pickets.

After this happened there was a commotion.
709 During the course of that commotion the ice cans were tipped over. At that time I saw Alden backed

up to the left front fender of the automobile with both his arms pinned to his side by Jeske, the
710 fellow whom Alden is accused of hitting.

711 **Cross-Examination**, by Mr. Knoedler.

The man Bournak whom I mentioned in my testimony was formerly an organizer and secretary-treasurer of our local. He is no longer connected with it and has not been since March or April.

712 When the men came with the ice, I tried to peacefully persuade them to refrain from making delivery of the ice. They had carried in one can of ice before I got it. I was arrested shortly before November 10th for disturbance at the hotel.

MATT PECKMAN,

called as a witness on behalf of the respondents, being first duly sworn, on oath testified as follows:

713 **Direct Examination**, by Mr. Goldberg.

I am a member of Local 122 and a striking employee of the Plankinton Hotel. I worked there over twenty years. A short time before the strike,
714 some time during the month of October, 1939, I told Mr. Wood that we needed an assistant house man. Mr. Wood told me that he had a nice fellow that he wanted me to put on. I spoke to this fellow and sent him down to the union. I don't know whether he went to the union or not, but he came back and told me he didn't want to let him join. I took this up with Mr. Wood and he said that he would get along without an

715 assistant. I don't recall Mr. Wood speaking to
716 me about not applying to the union for help.

(It was stipulated that on November 4, Local No. 122 filed a petition for investigation and certification to determine bargaining rights with the National Labor Board at the Twelfth Regional Office at Milwaukee, Wisconsin. That no papers have been served by the National Labor Board on the complaint and that no further official action has been taken by that Board. The complainant agreed to the stipulation without admitting its admissibility or relevancy.)

717 **JOHN HEISDORF,**

recalled as a witness on behalf of the respondents, having been previously sworn, on oath testified as follows:

Direct Examination, by Mr. Goldberg.

718 I removed a fellow by the name of James from the Plankinton House picket line because he continually got drunk, created a disturbance on the picket line and the sergeant had complained to me about it.

(Respondents' Exhibit No. 57, being a form letter sent out by the Milwaukee Hotel Association, is marked, offered and received, together with stipulation that the complainant received a copy
719 of it on November 28; Respondents' Exhibit No. 58, being a letter under date of November 25th from the Independent Union to one of the employees, is marked and received without objection.)

EDNA BARRETT,

called as a witness on behalf of the respondents, being first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Goldberg.

My name is Edna Barrett, I am married, a member of Local 122, and was regularly employed at the Wisconsin Hotel. I have not been on picket
720 duty lately because I was injured there. I also did picket duty at the Plankinton Hotel. The week following the calling of the strike I saw Otis Gomillion at that hotel. He came swinging out of
721 the hotel. He touched me on the shoulder and said that we were fools. He said that he had $6,000,000 which says that all of us pickets will die and the worms will eat our bones before they sign.

No cross-examination.

GLADYS VAN,

called as a witness on behalf of the respondents, being first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Goldberg.

722 I worked for the Plankinton Hotel for about three years before the strike. About two months before the strike Mr. Wood told me that there was no truth to the rumors that he was going to cut the wages and that he was going to raise them as quickly as he could.

No cross-examination.

723 **JOHN ALEXANDER,**

recalled as a witness on behalf of the respondents, having been previously first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Goldberg.

The union permits the employment of student help, the number to be determined by the size of
724 the restaurant and the hotel. Before students are allowed to work the employer must notify the union as to whether he will employ one student or two, whatever the case may be. This student must come to union headquarters and get a "working slip," for which there are no initiation fees and no dues and no charges whatsoever. The
725 working slip is for the purpose of checking up on the number of students employed, since if we permitted employers to employ students indiscriminately without notifying the union, we might very soon have such a large number of students that they would displace our own legitimate food workers, members of the union, within the hotel or restaurant. By the issuance of working slips we know the exact number of students working at the hotels and restaurants. We never knew how many students the Plankinton Hotel hired, be-
726 cause Mr. Wood never called us to tell us that he needed students, but hired them himself without the previous permission, consent or knowledge of the union, nor did he notify us when he hired full-time workers, such as bellhops, housemen, kitchen help, etc. Such hiring of student help was contrary to regulations.

The union customarily permits students to work three hours at one meal, for which they receive two meals a day. Some employers make them work a little more and the students complain, but as long as it is not any longer than three hours we
727 cannot protect them. The students are not supposed to receive any pay for this, but sometimes the employer does pay them, to which we have no objection.

I have been a member of the hotel and restaurant union from 1920 to 1936. In 1936 I got my traveling card from New York to teach in a parochial school. From 1936 to 1938 I taught and also organized for the CIO, when I discovered that the CIO union was under the domination of the Communist Party, and after a long fight I brought the union into the American Federation of Labor.

728 I have worked in the hotel and resturant industry in all parts of the country and am familiar with the contracts in existence in the principal cities. Although the New York and San Fran-
729 cisco contracts are two of the best in the United States, the Milwaukee contract is way ahead of them. The advantages of the Milwaukee contract lie in the "seniority rights" and in the job "security rights," which have been called by Mr. Malcolm White, an attorney representing hotel interests in Milwaukee, "the declaration of the independence of the hotel and restaurant workers of Milwaukee." The wages in the Milwaukee
730 contract are absolutely higher than the New York
731 contract. These wages are higher than the Chicago contract. I believe the wages are higher

than in Detroit. The union would not submit to
732 a vote on a closed shop as recommended by the arbitration decision because in the first place we did not feel there was any necessity for a vote inasmuch as this was a continuance of the old contract and our demand for a week's vacation with pay was at least considered by the union as an amendment to the old contract. Our contract which was established in 1938 was governed by the laws existing at the time and not by the new laws that have been enacted since. The main reason was because we had a sad experience with
733 the Plankinton Hotel since the employer did not notify the union whenever he hired employees.
734 Since we knew a number of employees at the Plankinton who had been hired by the employer without the knowledge and consent of the union and were not members, we thought this factor would probably affect a vote in favor of the union. This was discussed and it was decided upon as a reason for not accepting this kind of a vote.
735 The union's decision not to accept the recommendation of the arbitration to submit to a vote was reached after discussing the effect of the Plankinton's hiring of non-union men and non-union women contrary to the terms of the contract. We felt that quite a number of employees hired by Mr. Wood were not members of the
736 union, and we felt this practice on the part of the employer might have the effect of having a larger vote than the legitimate union members
737 that were there. There was discussion about the

effect of the number of non-union employees hired by the Plankinton on a 75-per cent vote.

The union supplies men of superior skill at all times for the first-class hotels. We see to it that they get the best we have in the union. We have three thousand members, the best of whom are sent to the Plankinton, Schroeder and hotels of that type. We do this because we know that those
738 hotels are particular.

The first time I heard of any picket spitting on Mr. Wood was when he testified in this hearing. We never condoned such practice. We always take measures against one who may engage in
739 unpeaceful picketing. We discussed the matter at an executive board meeting after Mr. Wood's testimony.

Mr. Goldberg: "As long as the board is satisfied with that, I have no objection, but for the purposes of the record, we offer to prove that, if the union can learn the name of the individual who spit at Mr. Wood, appropriate action fitting with such ungentlemanly or unladylike conduct will be taken by the union."

740 **Cross-Examination,** by Mr. Knoeller.

I had been connected with the labor movement for about twenty years. I was never a member of the IWW nor was I an organized for the IWW, nor did I have any connection whatsoever with the IWW.

741 The CIO was dominated by the Communist party.

742 I joined the CIO in March or April of 1937, in Milwaukee. I have always advocated peaceful

743 picketing and peaceful persuasion. The Milwaukee Athletic Club had labor trouble during the year 1937. I was in charge of the pickets at that time. There was a sit-down strike there.

Mr. Goldberg: Then I object to this line of the questioning and move that it be stricken.

Commissioner Gooding: No, the answer may stand for what it will be taken for.

744 The union had no objection to students working at the various hotels in the city if the union was notified and permitted it. Our restaurant contract refers to students, and we apply the clause of the restaurant contract in the hotel con-
745 tract also. We had a gentlemen's agreement on the question of students.

(It was stipulated that there is no written provision in the hotel contract for students.)

I now recall that the hotel contract does not provide any specific exemptions for students. We
746 extend that privilege to them. The business agents are supposed to keep an eye on those matters.

Cashiers at many of the hotels in the city do belong to the union, except in those cases where the boss does not keep his word to notify the union to the effect that he employed a cashier. No ar-
747 rangements have been made after written contracts were entered into with various hotel managements permitting cashiers to work without joining the union. On numerous occasions men have been employed at the hotel without first calling the union and then sent to the union to become members, because of a stipulation in the contract

that if the union cannot furnish the type of worker desired by the employer within twelve hours, the employer then has the right to hire such employee, providing the union is notified. This applies also in cases of emergency. The employee then goes to the union, gets his work slip, starts to work for the employer and joins the union within fifteen days.

748 There have been exceptional cases where employees have been engaged at other hotels without first notifying the union. We have accepted such employees as members. This happened on a few occasions at the Plankinton. It very seldom happened at the other hotels.

749 I knew, starting in September of 1938, that Mr. Wood was employing people without first calling the union, and knew that that practice had continued practically to date. I cannot tell you the exact number of employees which the union accepted during this period in those cases where the union was not first notified that such employees had been employed by the Plankinton. I do not
750 recall, but there would be three or four, to my best judgment. These men were not sent to the union. Our business agents found them working there and asked them to join the union. None were sent by the management, that I know of.

751 They joined the union, paid their initiation fees, paid their dues, and many are members in good standing today.

Redirect Examination, by Mr. Goldberg.

No business agent has the right to change the terms of the contract. If Mr. Bournak agreed with Mr. Wood that a business agent could not go through the building to see if there were any violations, that was not done with the approval of the union.

752 It was in violation of the union contract itself.

Recross-Examination, by Mr. Knoeller.

Business agents had gone through the hotel and found employees who had been hired without the union office first being notified.

Redirect Cross-Examination, by Mr. Goldberg.

Those who we would discover were in the lobby
753 because Mr. Wood wasn't there to stop us. We would get reports from employees about hiring practices, and tried to investigate those reports.

754 **Examination**, by Commissioner Gooding.

There were many meetings, both membership and executive board meetings, including a meeting of the union membership immediately after the arbitration award was handed down and during the same week. It was a large meeting with about twelve hundred members present, and all of the employees were notified by notices posted in the kitchen, and by cards sent to them to their
755 homes and by the business agent, that is by word of mouth. I do not remember the exact date of the meeting.

Recross-Examination, by Mr. Knoeller.

That meeting was held the same week of the arbitration award. It is pretty difficult for me to remember the dates, because we held many meetings. We discussed the arbitration award, of course. I don't think it was more than a day or two afterwards.

756 **Redirect Examination**, by Mr. Goldberg.

The minutes of the meeting of the four arbitrators were taken up with the executive board, the negotiations committee and the local joint executive board. At those meetings there were discussions about the demands of the employers and about the effect of a vote on a closed-shop question.

757 This question of a 75 per cent vote was discussed, inasmuch as twenty-five hotels had already signed the contract, and since there is a clause in that contract which provides that if any more favorable clauses are allowed to another hotel, then the other twenty-five would receive the same benefits. We felt that with the open shop a greater number of employees within the hotels would be non-union people and that the union in six months would be destroyed. This was one of the most serious points that was discussed in most of the
758 meetings.

By the local joint executive board I refer to the body composed of three delegates from Local 122, Local 64 and Local 45, all affiliated with the International Union of Hotel and Restaurant Workers. This body has authority over the other exec-

ntive boards of the other locals, especially in strike situations. It pays the strike benefits, puts up the bail and pays the fine except where some people pay their own fines.

JACK HEISDORF,

recalled as a witness on behalf of the respondents, being previously duly sworn, was examined and testified as follows:

759 **Direct Examination** by Mr. Goldberg.

When it came to my attention that nonunion members were hired at the Plankinton Hotel I went to the hotel to investigate. In some cases it was necessary to remove the person from the job. The hotel tried to replace Mabel Smith, a union employee, with a nonunion employee. I took this matter up with Mrs. Smith, a housekeeper, and
760 Mr. Wood. Mr. Wood told me that he had discharged Mabel Smith for what he deemed just cause and replaced her with a colored lady who was on WPA. He told me he didn't call the union office because we couldn't give him the type of help that he wanted. He said that unless we accepted the new employee into the union he would not use a maid at all, because he would never put Mabel Smith to work. This new employee now has an application on file with the union.

761 Before we had an opportunity to act on this action the strike was called. I think she is out on strike. On several occasions busboys were sent to the office by Mrs. Hehmeyer. I complained to her about hiring busboys without first applying to

762 the union. The boys she sent over were not taken into the union. I don't know if they are still working, and since I wasn't allowed to go into the hotel to find out except if I sneaked in. I complained to Mrs. Hehmeyer about Charley Addis, who told me she thought he was in the union, but that if he wasn't she would send him to the office. Both Addis and Makoski told me they were not members of the union.

763 Makoski is the fellow who ran away with the picket sign. This happened approximately three weeks before the strike was called. I never told Mr. Wood or Mrs. Hehmeyer or anyone else at the hotel in an official capacity that they could hire employees themselves without applying to the union.

764 **Cross-Examination**, by Mr. Knoeller.

Makoski and Addis did appear at the union office and told me they wanted to apply, but they didn't have any money. I told them to come to the office on their following pay day, at which time I would discuss it further. I am not certain that it was Makoski.

I have the names on file in my book. I think that part of Mary Garner's initiation fee has been paid. We do not accept dues unless the initiation fee is paid and she is accepted by the body. She
765 is on the picket line now. Mr. Wood told me not to go through the hotel to perform any union business either in February or March, 1939. On
766 two occasions I went into the basement of the hotel in the custody of Mr. Hoffman, the assistant manager of the hotel, to see the maids. I was not

permitted at any time to go through the hotel. George Bournak told me that he had an understanding with Mr. Wood that he would not go through the hotel during business hours, but would confer with Mr. Wood in regard to union business. Mr. Wood told me the same thing. He
767 always treated me courteously and I never feared any violence from Mr. Wood or Mr. Hoffman.

Questioned by Commissioner Gooding:

I never asked Mr. Wood's permission to go into any department. I was walked out of the kitchen and told not to go through the hotel. On one occasion I received a complaint that a girl who had been working in the kitchen for approximately ninety days was not a member of the union. Mr. Wood told me that he would take care of it himself and that it wasn't necessary for me to go downstairs. I think the girl came to my office later, but I am not sure, because I didn't
768 know the girl, although Mr. Wood said that she would come to the office.

Redirect Examination, by Mr. Goldberg.

Mr. Wood did tell me of his arrangement with Mr. Bournak, but he didn't tell me that I was included in those arrangements. It is necessary
769 that we be permitted to go through the hotel because on lots of occasions we can't find Mr. Wood.

770 **Respondents rest.**

JOHN W. B. VAN HOUTEN,

called as a witness in rebuttal on behalf of complainant, being first duly sworn, on oath testified as follows:

Direct Examination, by Mr. Knoeller.

I am an employee in the office of Richardson, Robertson, Reeder & Stearns and am secretary of the Plankinton House Company. I was present at
771 a conversation between Mr. Wood and Mr. Knoop on November 4, 1939. Mr. Knoop seemed very much disturbed mentally and wanted to know what to do. Mr. Wood told him that it was up to him to decide. Knoop said that he didn't like to give his job up, but that he was afraid to go home. Mr. Wood told him that both he and his wife could stay at the hotel. Neither myself nor Mr. Wood stated that the hotel would not sign with the union even if they had to lock the doors, or that he would take Mr. Knoop to Chicago and get him a job if necessary.

772 **Cross-Examination**, by Mr. Goldberg.

I don't know what time Mr. Knoop came to the hotel, but I am sure it was not in the afternoon. It was two or three days after the strike. I do not know that he saw Mr. Wood on two separate occasions. No mention was made of a previous conversation the night before. As I stated, the young fellow was mentally disturbed and didn't know what to do, and Mr. Wood just told him that he would have to decide that himself.
773 Mr. Wood was sitting at the desk alongside the

cigar counter and I was right next to him. I believe that Mr. Knoop spoke first.

774 I don't recall how he started the conversation. He did not say that he had decided not to go to work and that he was going out on the picket line. I did not speak to him. Mr. Wood told him he could stay at the hotel. He did not use any language to dissuade Knoop from going out on the picket line. Mr. Wood told him he would have a

775 job, but he didn't tell him he would have a job for life and didn't say anything about a job if the hotel closed. He said nothing about going to Chicago with Mr. Knoop, and during the entire conversation no reference was made to the contract.

776 I did not make any statements at all during the conversation. I have made no memorandum as to the conversation and have not spoken about it to anyone.

777 **PEGGY HEHMEYER,**

called in rebuttal on behalf of the complainant, having been previously sworn, on oath was examined and testified as follows:

Direct Examination, by Mr. Knoeller.

I never made the statement attributed to me by Margaret Thie with respect to Helen Martel. I had agreed with her that during the summer months she could have off on Saturdays and Sundays to go fishing with her husband, but that in the fall, with business picking up, she would have to come in on the busier week-ends.

778 It was not a fact that Mrs. Martel quit her work because I forced her to work on Saturdays and

Sundays because of posting a notice in the dressing room. She stopped working at the Plankinton House about the 30th or 31st of October, just before the strike.

779 I did not discharge her for any union activity at the Plankinton House. I did not make the statements attributed to me by Margaret Thie on November 17th with reference to Phil Valley and the girls on strike. I did not state to her that there was a contract on the bulletin board guaranteeing any employees who stayed within the hotel a lifetime job. I don't know of any such contract that was posted on the bulletin board.

780 I was present at the conversation between Mr. Wood and Ruth Fairweather, but did not hear Mr. Wood call the strikers "a bunch of fools." I think he did say that he couldn't understand why they were out there. Mr. Wood said nothing about an independent union or taking out an injunction. I told Ruth Fairweather that I would give her a room. She had called up before coming down. She had not come in the day before because she didn't know if she was doing the right thing, and I told her that she must decide that question herself. I told her that she didn't have
781 to stay in the hotel, but that if she was afraid that I would take care of her and give her a room.

Questioned by Mr. Burns:

I did not tell Mrs. Fairweather that the hotel was forming an independent union of its own. Neither myself nor Mr. Wood made reference to the independent union in that conversation.

Examination (continued) by Mr. Knoeller:

I have seen and examined the 1937 labor contract (signature list marked "Complainant's Exhibit No. 59" and displayed to witness). I ex-
782 amined the contract before I put my signature to Exhibit 59, opposite the words "Coffee Shop." Mr. Wood asked me to read the 1937 contract, and after reading it, signed my name to the list.
783 After we had read both the 1937 and 1938 labor contracts, Mr. Wood instructed us to call the union whenever we needed help and to co-operate with the union in every way possible. I called the union during the years of 1937, 1938 and part of 1939. That was routine. I have called union help always, every week of the year, and the last two years that we have had contracts with them. All of my extra help are union members.
784 Charles Addis was employed as a student until this last September, when he told me he was not going back to school. I told him that he must join the union and I thought he did. Once or twice after that when I asked him if he had joined he told me that he did not. I told him that he must go down and join. He said that he didn't because he hadn't made up his mind whether he was going to school or not.

Gerald Klimek was employed about the middle of October, 1939, in an emergency because we needed a bus boy right away. I told him to join the union.

785 **Cross-Examination**, by Mr. Goldberg.

We didn't need much help because our help stuck with us. We called the union for help

every day because we have parties every day, when we need extra waiters. I called the union about a year ago in November and got help that wasn't what I wanted. I tried to employ help directly from the union office but after five or six attempts, I gave it up because I don't have a great deal of time to break in a boy for one or two days to see if he can work, and they just weren't the type of help that I wanted.

When I employ student help, I take employees who have no experience, but I have my pick of them, and I don't take the first one that is sent to me. I remember telling whoever answered the phone at the union that I wanted desirable help. Good, young, clean, bright boys and not somebody that was an exwaiter or not somebody that wasn't clean in appearance.

786 I did not complain to Jack Heisdorf or John Alexander that they were not giving me satisfactory bus boys. Mr. Wood told me to call the union when I needed help. He didn't tell me that he himself wasn't going to call the union in hiring help.

In the middle of October, one of our bus boys by the name of Frank Rand wanted to get an outside job and left an opening that I had to fill right away because we were busy. He gave me about a week's notice, but I did not call the union and ask them to send a bus boy.

787 I did not apply to the union for a man to replace Addis because he did not as yet quit school and I wasn't going to call a man until he was gone. When I asked Addis to join the union, I didn't call the union to tell them we were sending

him over.' I was very much surprised when I found out he hadn't joined.

788 I knew that all employees in order to work were required to be members in good standing except in an emergency. I do not consider one week's notice an emergency but I happened to be busy at the time and I didn't have time to get a new boy and this boy just came in. I was very glad to get somebody so easily. I didn't have time for one whole week to go to the phone and call Marquette 0290 and ask them to send over a bus boy.

789 I never checked up to determine whether Addis joined the union. I hired Makoski and called the union and told them. He was hired as an emer-
790 gency employee. I couldn't get free long enough to call the union and ask them to send over a man. He was sent in to me by his sister who works at the hotel. She is a waitress. I never
791 called Phil Valley and complained to him about bus boys that we got.

Neither Mr. Wood nor myself made any statement about an independent union when we talked to Margaret Thie: I don't remember her asking about her seniority rights, nor do I remember
792 any conversation about an injunctio.. Mrs. Thie spoke to me two and a half or three weeks ago. I remember my conversation with her.

793 Ruth Fairweather came into the hotel about two or three weeks ago at 6 o'clock in the evening. She spoke to me in the lobby. Mr. Wood did not join us until later. We did not sit down until Mr.
794 Wood joined us. I had asked Mrs. Fairweather why she hadn't come in the day before, and she

had told me that she had changed her mind and didn't think she would come in. I told her it was entirely up to her. Mr. Wood then walked toward
795 us and joined us. When I told Mr. Wood that she had decided not to come to work he said it was entirely up to her. Neither of us tried to persuade her to come in. I think some mention was made about starving us out and I said that we were eating pretty well, and I think I also made a joke about food being sent to us from Chicago.

796 Mr. Wood said that Walter Schroeder was sending him food by parcel post as a joke. We all laughed about it. I didn't hear him say that the other hotels were backing him. He did not discuss the company union or the independent union.

797 I never heard Mr. Wood say that the pickets were fools. He said to Ruth Fairweather and myself why he couldn't understand why they were out there. I am positive that Ruth did not mention seniority rights or her ability to get work elsewhere in the city or her getting in bad with the union.

798 I remember some conversation about a notice in the girls' locker room. I never saw it. I did ask three or four girls who posted it. I do not recall denying this is my previous testimony.

799 I think that I have a right to know what kind of notices are being posted in the girls' dressing room. I do not go down to the girls' dressing room. I can read English. I was told that there was a notice there and I asked the girls because I wanted to know what kind of a notice it was. I didn't even know it was a union notice. I don't

keep my clothes in the waitresses' dressing room. I didn't accuse any girls of posting the notice. I asked Helen Martel if she did. It didn't make a bit of difference to me who posted the notice, but I wanted to find out what the contents of the notice were.

I can tell you what date Helen Martel quit if I have a calendar. When I learned that a notice had been posted I asked who posted it. I was not angry. I heard about it when I was in the Sky Room. I wanted to know who posted it because I thought I could go to that person and find out what the notice was about. I don't have time to run downstairs during the busy noontime. I did not interrogate anybody. I questioned all the girls that I spoke to in the Sky Room. They are mistaken if they testify that I came down to the dressing room and asked about it there.

Redirect Examination, by Mr. Knoeller.

I hired Gerald Klimek because he walked in and asked me for work, and I told him that I needed him right away, but that he would have to join the union. I did not know that Mr. Addis was going to leave school.

Certificate of reporter.

(It was stipulated that Leo Makowski has been a member of the union since May, 1939; James Myrick has been a member since September, 1938; that Jeanette Pergolis has been a member since April, 1937; that Rudolph Stano has been a member since January 1, 1939, and that William J.

O'Connor was a member of the union until June, 1938, at which time he was suspended. This stipulation was with reference to the list of names appearing on page 4, Exhibit 24.)

HIRAM O. WOOD,

recalled as a witness on behalf of complainants, having been previously duly sworn, on oath testified as follows:

Redirect Examination, by Mr. Knoeller.

I was in court yesterday when Robert Knoop
807 testified. He was a bellman at the hotel. At the time of the conversation referred to Mr. Van Houten was present, but Mr. Richardson was not. Neither of us stated that we would lock the doors before we would sign with the union, and that if we had to lock the doors we would take Knoop
808 to Chicago for a job. We never posted any contract guaranteeing all the workers who returned a job for life.

I recall the conversation with Mrs. Hehmeyer and Ruth Fairweather about three and a half weeks ago. I did not call the strikers a bunch of fools, nor did I say I could not understand why they were doing it. Neither I nor Mrs. Hehmeyer stated that I would form an independent union or that we were taking out an injunction which would protect the ones on the inside. Mrs. Fairweather was told that she could come back any time that she wishes and be given a room if she'd choose to occupy it.

On November 1, 1939, the Plankinton House
809 had 188 employes. On page of Exhibit 24, the

No. 56 was put in to indicate the number of employees on that page. (There was a stipulation with respect to five of the employees having been union members.) Twenty-seven of the employees were hired since the strike. The list of parking station attendants being Exhibit No. 60, contains
810 names which also appear on page 4 of Exhibit 24. Besides seven of those there are some students' names that also appear on page 4 of Exhibit 24. The names of three supervisory employes, Katherine Smith, Leona Casper and Gertrude Raeuber and also as well there is the name of an Industrial Commission apprentice Harvey Effenberger. I recognize the names of John Flood and George Hackett as students.

811 (Stipulated that if Mrs. Hehmeyer were called to testify she would testify that Arnold Kowalski, William J. O'Connor and George were students.)

It is a fact that I have employed people in the hotel without first applying to the union for help. These were Wayne Banning and Robert Jeske. A friend of mine named Joseph Moon called me with reference to Wayne Banning, whom he said was a fine boy and whom he said he wanted me to
812 hire. I told him that I didn't have an opportunity, but I would look him over. He came, and I was impressed by his appearance and told him if he couldn't find work elsewhere he should come back to see me and I would try and see what I could do. He had to leave his job with Mr. Moon because of pending illness or confinement in his family and really was in serious straits as far as his finances were concerned. After he came

back several times I put him to work as a student under our efficient barman and also had him work on the parking lot and other odd jobs.

I told Frank Burgarino, the head of the Bartenders Union, about him, who told me to send him up to the union when he was ready to work
813 as a bartender. I spoke to him about it again after that, but the man never applied for a license because he never got to the point where I thought he could work alone.

With respect to Robert Jeske, I brought him in because I had a short-time job which was more or less personal in nature. I later tried to give him a job in the housekeeping department, but the union was reluctant to admit any more housemen, so we could not give him a job, as the fellow Peckman referred to in his testimony. Later on we had an opening as an assistant purchasing agent, so we put him to work on trial. There was a question in my mind whether he was eligible to union membership, or at least whether he should be required to join until he made good on this new job which he occupied only a few days before the strike. I spoke to George Bournak with regard to hiring help without first notifying the union, and he told me the union was interested primarily in having every employee a member.

814 Mr. Goldberg: I object to conversations with George Bournak as hearsay. The man is no longer a member of the union. He was asked to resign by the union, and in view of the circumstances we have in the record I don't think he can be taken as a representative of the union, and

therefore any testimony as to conversations with him would be hearsay.

Mr. Knoeller: Mr. Heisdorf testified that Mr. Bournak was a member of the union until March or April, 1939.

Commissioner Gooding: Objection overruled.

This conversation took place immediately after the 1938 contract at the Plankinton House in connection in engaging staff at the Kilbourn Hotel. We were opening that hotel in November, 1938, and I was somewhat concerned about the crew. I asked Bournak if we could engage our own crews and have them join the union later. He said that if he couldn't furnish people to satisfy me we would have to do it that way. Later on, when we were ready, I called Bournak and he sent some people over. We engaged some of them.
815 With respect to the balance, he told me I could hire them and he would come over with applications for them. After the 1938 contract, Bournak told me that the requirement that cashiers join the union would be overlooked at the Plankinton.

Kobina Block, Clara Heitman, Grace Guse, Margaret Wohla and Dorothy Walgreen are cashiers at the Plankinton House. I do not believe they are members of the union; but I do not know. I did not hire Mary Garner. She applied for membership in the union and has paid the first installment on her initiation fee, holding the receipt for
816 it. Mary Garner was hired to displace a discharged girl. I don't recall speaking to Mr. Heisdorf with respect to her. She was hired by the housekeeper. I do not recall, but this may have happened as Heisdorf stated it happened.

Dan Christl was hired in September, 1939, without first notifying the union; but he was told and did become a member of the union.

817 During the year 1939 I wrote several letters to the union with respect to the union status of the employees in accordance with my arrangement with Mr. Bournak that if he would stay out of the departments; and not interfere with the work, I would collect the dues for him. Mr. Heisdorf confirmed his understanding of the arrangement with Bournak when he got his position as supervisor of the Plankinton House.

(Exhibits 61-65 marked by the reporter and introduced by stipulation as being correct copies of the original letters sent to Local 122 during 1939.)

818 to 821 (Testimony omitted because it relates to interstate commerce, which is not in issue on this appeal.)

822 (Complainant's Exhibit 66 received in evidence, being the vouchers and invoice bill from the printer with respect to the $26.00 check previously referred to in the testimony.)

823 There are now 148 employees working at the Plankinton House. Loretta Sohn, to whom previous reference has been made, has told me that she is a member of the union. Julius Cook, whose name appears on Exhibit 60 and to whom previous reference has been made, is a parking station attendant.

824 When I stated that I was advised not to volunteer information, it was because you told me not to answer too quickly and before the question was finished. I have not withheld any information whatsoever during the course of these proceedings.

Recross-Examination, by Mr. Goldberg.

Exhibits 61-65 have reference to collection of delinquent dues. They have nothing to do with
825 the hiring of employees. I was given the names of persons who are delinquent in dues by the various business agents, who asked me to see that the members paid, since article 2 of the agreement provides that all employees subject to the jurisdiction of the union shall be and remain good
826 members in the union in order to retain their jobs. My arrangements with Mr. Bournak were oral. I knew that Mr. Valley was superior to Bournak and signed the contract for the union, but I didn't know he was the business agent of the union. Exhibit 66, the invoice bill, was received at about the time we issued the check.

827 I don't know if I gave the check to Mr. Bournak. I did not give Mr. Bournak two checks. (Respondents' Exhibit 67 marked by the reporter for identification.) I never saw Exhibit 67 that I know of. (Exhibit 67, being invoice, received in evidence.) I believe that we had 188 employees on November 1st.

(Mr. Goldberg asks Board to read page 2 of the
828 complaints worn to by Mr. Richardson, and paragraph 3 thereof, alleging that there were 160 employees, of which number 83 had either returned to work or continued to work, and that such complaint was sworn to on November 18, 1939.)

I do not know whether the list of 188 includes employees who were hired during the strike. I have no instrument in writing wherein the union agreed to exempt cashiers from the effect of the

829 contract. I don't recall the language which was used by Mr. Heisdorf in confirming his understanding of my arrangement with Bournak. I don't recall the exact language I used when I spoke to Ruth Fairweather about the pickets, but I think I told her that I was sorry they felt that they had to do that. I don't recall Ruth Fairweather's mentioning her loss of seniority rights if she came back.

830 (Stipulated that the Alexander mentioned on Exhibit 6 is John Alexander, who testified in these proceedings and who is the present union officer that testified in the morning, and that the name Desotole is the party mentioned in connection with the campaign literature previously referred to in the testimony.)

Questioned by Commissioner Gooding:

There was no request by the union during the life of these contracts that we discharge any employee at the Plankinton House because he was delinquent in his dues or because he was not a member of the union.

Redirect Examination, by Mr. Knoeller.

830-831 (Testimony omitted because dealing with interstate commerce, which issue is not pertinent.)

Complainants rest.

832 **JOHN HEISDORF,**

recalled as a witness on behalf of the respondents, having been previously duly sworn, on oath testified as follows:

Direct Examination, by Mr. Goldberg.

I did not enter into any arrangement or approve any arrangement whereby the Plankinton House could hire any employees without applying to the union.

Respondents rest.

Mr. Goldberg: I move the proceedings as to the Laundry Workers and Bartenders, Operating Engineers, and Milwaukee Building Trades Council be dismissed, because the complainant has not met
833 the burden of proof as to the charges against said four organizations. I move the proceedings be dismissed against the Hotel and Restaurant Employees International Alliance, Local 122, because no unfair labor practice as charged has been proven concerning that organization. I move that the proceedings as to Phil L. Valley be dismissed for the same reason—no charges have been proven and no violations of any law. I move that the proceedings as against John Alexander be dismissed, and I make separate motion referring to John Alexander and Jack Heisdorf for the same reasons. I also renew all the motions I made at the beginning of the proceedings. I don't think it is necessary to set them forth at length. It will only encumber the record.

834 (Discussion with respect to briefs.)

835 **Certificate of official reporter.**

836 **Cover.**

837- **FINDINGS OF FACT, CONCLUSIONS OF**
846 **LAW AND ORDER.**

(Venue and title omitted.)

This matter coming on to be heard, and the full Board having heard the testimony, arguments of counsel, and being advised in the premises, make
838 and file the following findings of fact, conclusions of law and order:

FINDINGS OF FACT.

1. The Plankinton House Company is a corporation duly organized under the laws of the State of Wisconsin, having its principal office at 609 North Plankinton avenue, Milwaukee, Wisconsin. It operates the Plankinton House and the Kilbourn Hotel, both located in the City of Milwaukee, Wisconsin, together with three automobile parking lots in said city.

2. Hotel and Restaurant Employees International Alliance, Local No. 122, Bartenders International League of America, Local No. 64, International Laundry Workers, Local No. 174, International Union Operating Engineers, Local No. 311, are voluntary unincorporated associations, each of which is affiliated with the American Federation of Labor.

3. The Milwaukee Building Trades Council is a central labor organization composed of various labor unions in the City of Milwaukee, having as members persons employed in the building trades, all of which labor unions are affiliated with the American Federation of Labor.

4. The Independent Organization of the Plankinton House Employes is an unaffiliated labor organization admitting to membership all employes of the Plankinton House Company, excepting officers, directors, executives and supervisors, and was organized on the 21st day of November, 1939.

5. On the 16th day of June, 1938, the complainant, Plankinton House Company, entered into a collective bargaining contract with the Hotel and Restaurant Employees International Alliance, Local No. 122, International Laundry Workers, Local No. 174, Bartenders International League of America, Local No. 64, International Union of Operating Engineers, Local No. 311, and the Milwaukee Building Trades Council, which contract
839 covered wages, hours and working conditions governing the employes of the Plankinton House Company, employes at the Plankinton House and the Kilbourn Hotel, and provided as a condition of such employment that all employes coming within the terms of said contract must be and remain members of one of the respective unions so long as they were employed by the Plankinton House Company.

6. It was further provided that said contract was to continue for a period of one year, ending

on the 15th day of June, 1939, and for consecutive one year renewals unless either party served notice in writing on the other party at least thirty days before the expiration of such year, that such party desired to terminate the agreement at the end of such contract year. It was further provided that either party might notify the other party in writing within thirty days of the date of termination of such contract that it desired the contract continued for an additional year, and that such party desired to negotiate hours, wages, and working conditions for the following contract year. If such notice were sent, the contract was to continue in force and the terms agreed upon by virtue of such subsequent negotiations were to be retroactive from the date of the commencement of any such year. If the parties could not reach an agreement through negotiation on or before thirty days after the termination of the preceding contract year, the difference was to be submitted to arbitration in accordance with the procedure prescribed by the contract. Such arbitration was to be final and binding on both parties, but if either party were dissatisfied with the arbitration award, the right to strike or lock-out was reserved to the union and the company respectively.

7. On May 15, 1939, the Hotel and Restaurant Employees International Alliance, Local No. 122, International Laundry Workers, Local No. 174, International Union Operating Engineers, Local No. 311, and the Milwaukee Building Trades Council, by their attorney, I. E. Goldberg, notified the

complainant company in writing that the named
840 unions desired to continue the contract dated June 16, 1938, for an additional year, but desired to negotiate improved hours, wages, working conditions and the establishment of vacations with pay for the contract year commencing June 16, 1939.

8. On May 16, 1939, the Plankinton House Company, by a written notice delivered to Phil L. Valley, and addressed to Local No. 122, Hotel and Restaurant Employees, Local No. 174, Laundry Workers, and Local No. 64, Bartenders League of America, stated that it desired to continue the contract for an additional year, and desired to negotiate hours, wages and working conditions for such additional year.

9. Thereafter, the unions proposed certain changes in the contract existing between themselves and the Plankinton House Company, and on July 1, 1939, the Plankinton House Company, together with other hotels involved, proposed changes that they desired in said contract.

10. Negotiations between the parties failed to result in any agreement, and on July 11, 1939, the unions involved, by their attorney, I. E. Goldberg, notified the company in writing, demanding arbitration of the dispute relating to the terms of the contract for the ensuing year, and advised the company that Hotel and Restaurant Employees International Alliance, Local No. 122, had designated Phil L. Valley and I. E. Goldberg as its representatives on such arbitration board. Thereafter the Plankinton House Company, in conjunction with other hotels, named as representatives

on the arbitration board Clark M. Robertson and Lewis F. Thomas. The four arbitrators so appointed were unable to agree on a fifth member of said board, and a request was made to the Wisconsin Employment Relations Board that it designate a fifth member of a board of arbitration to arbitrate a dispute existing between the Plankinton House Company, operating the Hotels Plankinton and Kilbourn, and other companies operating hotels, and Hotel and Restaurant Employees International Alliance, Local No. 122, Bar-
841 tenders International League of America, Local No. 64, International Union Operating Engineers, Local No. 311, International Laundry Workers, Local No. 174, and Milwaukee Building Trades Council. On September 8, 1939, pursuant to written request therefor, the Wisconsin Employment Relations Board appointed Alfred H. Handrich as the fifth member of such arbitration board. Thereafter I. E. Goldberg resigned as a member of the arbitration board and was succeeded by Arthur Johnson, designated by the unions to succeed him.

11. Mr. I. E. Goldberg is a duly licensed and practicing attorney in the State of Wisconsin, located in the City of Milwaukee, and during all of the negotiations between the unions and the complainant, Plankinton House Company, and in the proceedings before the arbitration board above described, acted as the attorney for all of the unions party to said contract, and at the time of the hearing before the arbitration board, consented that said Board determine whether its

award would affect all of the unions party to the contract, or only the Hotel and Restaurant Employees International Alliance, Local No. 122.

12. On October 30, 1939, the board of arbitration issued its award, Messrs. Valley and Johnson dissenting. The award consisted of a complete revised contract covering wages, hours and working conditions affecting employes of the Plankinton House and Kilbourn Hotels and other hotels then in dispute with the Unions, such contract to be effective with respect to the company and the five respondent unions.

13. On November 1, 1939, the Plankinton House Company notified the Hotel and Restaurant Employees International Alliance, Local No. 122, and the International Laundry Workers, Local No. 174, by letter addressed to I. E. Goldberg, attorney for such unions, that it was ready and willing to execute a contract in accordance with the terms of the arbitration award.

14. On November 2, 1939, in the afternoon, the
842 employes of the Plankinton House Company at both the Plankinton House and the Kilbourn Hotel, went on strike.

15. Prior to calling such strike, the employes of the Plankinton House Company did not vote by secret ballot to call such strike.

16. Immediately after the strike was called, picketing was engaged in at the three entrances to the Plankinton House. Picketing was carried on by the members of all of the unions involved,

and pickets carried banners bearing the names of all respondent unions.

17. Phil L. Valley is business manager of Hotel and Restaurant Employees International Alliance, Local No. 122, and as such business manager notified Marquette University and the Milwaukee School of Engineering, directing that all students working at the Plankinton House for their meals be ordered to immediately discontinue such work, and that unless such students did discontinue work at the Plankinton House that the union would be forced to stop the employment of university students working at other hotels and restaurants in the City of Milwaukee which had collective bargaining contracts with Local No. 122.

18. That ever since the strike the Plankinton House and the Kilbourn Hotel have continued to operate with the new employes replacing the striking employes.

19. On November 4, 1939, union pickets, by means of force, prevented delivery to the Plankinton House of floral decorations by one Joseph Mueller, an employe of August F. Kellner Company. That as a result of the altercation at said time Jack Heisdorf, vice-president of Local No. 122, Hotel and Restaurant Employees International Alliance, and Charles McLaughlin, assistant to the secretary of Local No. 122, were arrested, and on November 17, 1939, convicted of assault and battery, McLaughlin being filed $10.00 and costs and Heisdorf being fined $5.00 and costs, the sentence against Heisdorf being suspended and he

843 was placed on probation for thirty days. That Local No. 122 provided counsel and bail for both Heisdorf and McLaughlin and paid McLaughlin's fine.

20. Charles McLaughlin returned to the picket line immediately after his arrest, and on November 17, 1939, assaulted one Lester Raasch, an employe of the Plankinton House, was again arrested, convicted and fined $25.00 and costs and the union again provided him with counsel and paid such fine.

21. On November 4, 1939, two salesmen representing the Automotive Electrical Association, who were attempting to deliver displays and samples to the Plankinton House, were, by means of force, prohibited from making the delivery by Phil L. Valley and a number of pickets.

22. On November 10, 1939, Jack Heisdorf, Charles Alden, striking employe of the Plankinton House, and other pickets, by the use of force, prevented delivery of ice cubes to the Plankinton House, and in the course of the attempted delivery, Charles Alden assaulted Robert Jeske, then an employe of the Plankinton House.

23. On November 17, 1939, Paul Ziebell, an employe of the Plankinton House, was assaulted by James O'Brien, a picket employed by the union, and stationed on the picket line at the Plankinton House. O'Brien was arrested, convicted and fined five dollars and costs.

24. On November 14, 1939, Edward Knopf, an employe of the Plankinton House, was assaulted

by John Thomas O'Maher, a picket stationed by the union at the Plankinton House, and a striking employe of the Plankinton House.

25. On November 17, 1939, Rudolph Stano, an employe of the Plankinton House, was assaulted by Joseph Hofich, a picket stationed at the Plankinton House by the union, and Hofich was arrested, convicted, and fined five dollars and costs.

26. On November 17, 1939, Thomas James, an employe of the Plankinton House, was assaulted
844 by Larry McAllen, a picket stationed at the hotel by the union, and fined five dollars and costs.

27. Throughout the strike, the City of Milwaukee caused to be stationed at the Plankinton House throughout the twenty-four hours of each day, six police officers for the purpose of maintaining order.

CONCLUSIONS OF LAW.

The Board finds as conclusions of law:

1. That the contractual relationship existing between the Plankinton House Company and the respondent unions was terminated by the respondent unions on the 2nd day of November, 1939, by the refusal of said unions to accept the award of the board of arbitration, and their act of calling a strike at the Plankinton House and the Kilbourn Hotel.

2. That the respondent unions are guilty of unfair labor practices by cooperating and engaging in promoting and inducing picketing and boycotting, all being overt concomitants of a strike,

without first obtaining the approval of the majority of the employes of the Plankinton House Company by a secret ballot.

3. That all of the former employes of the Plankinton House Company who went out on strike and who remained out on strike, have been parties to an unfair labor practice by cooperating and engaging in a strike without first obtaining the approval of a majority of such employes.

4. That the following named persons, by reason of threats and assaults made by them to and on employes of the Plankinton House or persons seeking to do business with the Plankinton House, or by misdemeanors committed by them arising out of the controversy between the respondent unions and the complainant, Plankinton House Company, are guilty of unfair labor practices. Phil L. Valley, Jack Heisdorf, Charles McLaughlin, Charles Alden, James C. O'Brien, John Thomas O'Maher, Joseph Hofich and Thomas James.

845 Upon the basis of the foregoing findings of fact and conclusions of law the Board, pursuant to Section 111.07 (4) of the Wisconsin Statutes, makes the following

ORDER.

It is ordered that the respondent unions, Hotel and Restaurant Employees International Alliance, Local No. 122, International Laundry Workers, Local No. 174, Bartenders International League of America, Local No. 64, International Union of Operating Engineers, Local No. 311, and the Mil-

waukee Building Trades Council, the officers, members, agents, successors and assigns of each, shall:

1. Immediately cease and desist from:

(a) Engaging in promoting or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;

(b) Attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of the Plankinton House Company;

(c) Boycotting in any way the Plankinton House Company.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the act:

(a) Post notices to their members in conspicuous places at the union headquarters that the union has ceased and desisted in the manner aforesaid, and that all officers, members and agents of the union are to refrain from engaging in promoting or inducing picketing and boycotting of the Plankinton House Company, and also to refrain from attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of
846 the Plankinton House Company.

(b) Notify the Board in writing forthwith that steps have been taken by each of the respondent unions to comply herewith.

Given under our hands and seal at the City of

Madison, Wisconsin, this 15th day of February, 1940.

Wisconsin Employment Relations Board,
By Henry C. Fuldner,
Chairman.
L. E. Gooding,
Commissioner,
R. Floyd Green,
Commissioner.

847–854 **DECISION.**

(Venue and title omitted.)

847 The Board has today made and filed findings of fact, conclusions of law, and an order in the above-entitled matter. The findings of fact quite fully disclose the situation between the parties existing as a result of collective bargaining agreements between the hotel on the one hand and the respondent unions on the other. During the year commencing June 16, 1938, and ending June 15, 1939, wages, hours and working conditions of the employes of the hotel were regulated by a single contract between the hotel and Locals 122, 174, 64, 311 and the Milwaukee Building Trades Council. Near the end of the year, I. E. Goldberg, of the firm of Padway, Goldberg & Tarrell,
848 was retained by all of the unions parties to the hotel agreement, to represent such unions in negotiations contemplated, relating to changes in the contract for the ensuing contract year. All of the unions, with the exception of Local No. 64, on May 15, 1939, by letter from Mr. Goldberg to the

hotel, gave notice to the employer that they desired the contract to continue for an additional year, but desired to negotiate improved wages, hours, working conditions and vacations with pay. A similar notice was sent by the hotel to Phil L. Valley, business agent of Local No. 122. This notice, in addition to Local 122, was also addressed to Local 174 and Local 64, but was not delivered to any officer or representative of such locals. As a result of such notice, negotiations were carried on between the parties. Proposed revisions to the contract were submitted on behalf of all of the unions parties to the original contract, and the hotel also submitted to the unions proposals that they desired incorporated in the contract for the following year. All of the unions took part in the negotiations between the parties, such negotiations failing to result in any agreement. On July 11 Mr. Goldberg wrote to the representatives of the hotels, apparently on behalf of all of the unions that were parties to the contract. In this letter he said: "Our clients, the involved unions, and our office have given this a great deal of consideration and study." In the same letter he demanded on behalf of Local 122 arbitration of the dispute, and designated representatives selected by such local as members of the arbitration board. The hotel, in response to this demand, designated its representatives. The four members of the arbitration board, being unable to agree on a fifth member, joined in a request to the Wisconsin Employment Relations Board that it appoint a fifth impartial member of

the board of arbitration. This request to the Wisconsin Employment Relations Board was signed by J. E. Goldberg and Phil L. Valley, and requested the appointment of an arbitrator to arbitrate a dispute existing between Local 122,
849 Local 64, Local 311, Local 174, the Milwaukee Building Trades Council, and the operating companies of certain hotels, among others the Plankinton House Company.

It clearly appears from these facts that all parties to the dispute up to the first day of the hearing before the board of arbitration were of the opinion that this was a single contract, and that the company was negotiating with all of the unions for changes in such contract, and that if there was any failure on the part either of any of the unions or of the employer to give adequate notice, that such failure had been waived by the action of the parties in the negotiations they carried on, and was specifically waived by Mr. Goldberg on behalf of the unions by agreeing before the board of arbitration that such board might determine whether its findings affected all of the unions party to the contract, or only applied to Local No. 122. This matter, at any rate, was submitted to the board of arbitration, and the arbitration award was effective as to all parties to the contract.

The award of the board of arbitration was in the nature of a proposed contract. The proposed contract provided in Article II as follows:

"Article II. The union shall be the exclusive bargaining agent for the employees

of the employer which come within the jurisdiction of the respective unions. If the unions, at their option, desire an all-union agreement, all employees in each hotel covered by this contract subject to the jrisdiction of the union, a party hereto, shall be and remain members in good standing in the union in order to retain employment, provided that three-fourths or more of the employees in the proper collective bargaining unit (each hotel considered separately) shall have voted affirmatively (by secret ballot) in favor of an all-union agreement in a referendum conducted by the Wisconsin Employment Relations Board.

"In the event three-fourths or more of the employees of the proper collective bargaining unit in any hotel covered by this agreement shall have voted in favor of an all-union agreement as provided in the preceding paragraph, such employer agrees to notify the business representative for the Union when in need of an employee and if the union cannot furnish an employee acceptable to the employer within twelve hours, and also in cases of emergency, the employer may employ any person not a member of such union, provided such employee shall become a member of such union within fifteen (15) days from the date of the employment. Employer in such case also agrees not to keep in his employ any employee now a member, or who hereafter becomes a member of the union, who relinquishes or loses his membership in the union.

"In the event of an all-union agreement as herein provided, new members will not be obligated to pay any greater or further initiation fee, dues or other charges, assessments,

or donations, not required by persons now members of the Union."

The requirement in the proposed contract that before the closed shop provision should be effective, there should be a referendum conducted by the Wisconsin Employment Relations Board at which three-fourths or more of the employes of the hotel approve such provision, was objectionable to the unions. This award was handed down on October 30, 1939. The hotel notified Mr. Goldberg, the attorney for the union, that the hotel would accept such an award, and execute a proposed contract. On the following day, the employes of the hotel went on strike.

It must be remembered that a contract between unions and an employer is entered into primarily for the purpose of stabilizing employment relations in the plant or industry over a period of time, and that such a contract must of necessity be subject to a more liberal interpretation than some other contracts might receive. It has seemed to us that in this case, the principal dispute between the parties was over the closed shop provision contained in the 1938-39 contract, and that this provision affected all of the parties to the contract equally. All of the parties negotiated with reference to it, and it does not seem possible that under the circumstances we have in this case, that without specific agreement between the company on the one hand, and any one of the unions on the other, that the contract could continue with one union and not with the rest of them.

The respondent unions take the position that both parties having elected to continue the contract for an additional year, such contract con-
851 tinues and binds both parties to the agreement, this even though the union should see fit to go out on strike in order to enforce what it feels to be its rights. If it is the contention of the respondent unions that the contract continues and is enforceable, then their remedy would not be striking to compel the employer to accede to their demands, but would be a proceeding in court to enforce the provisions of the contract or before the proper labor relations board to compel the employer to abide by the provisions of such contract.

It seems to us that the correct interpretation of this contract is that it was to continue pending negotiations between the parties, that if negotiations were unsuccessful, it would continue until such time as there was an award from a board of arbitration properly appointed, that after the award by the board of arbitration, both parties might accept such an award and be bound by it, or either party might refuse to accept the award, repudiate the contract, and that thereafter there would be no contractual relationship between the parties. In this case, all of the unions involved saw fit to repudiate the contract, and refused to be bound by the terms laid down by the board of arbitration. This they had a perfect right to do, but having done so, the result is that there is no contractual relationship now in existence.

Before going on strike, no vote by secret ballot authorizing the strike, was taken among the employes of the hotel. This, under Chapter 111 of

the Wisconsin Statutes, is clearly an unfair labor practice, and all of the employes taking part in such strike are necessarily parties to such unfair labor practice. The result to the employes, under Section 111.02 (3) of the Wisconsin Statutes, is that such employees have lost their status and are no longer employes of the Plankinton House Company. To many this result may seem to be a
852 harsh penalty, but it is a result that flows naturally from this law, and is something which this Board as an administrative board, has nothing to do with. Here the unions took the position that Chapter 111 of the Wisconsin Statutes did not apply to them, that they might have a closed shop contract without complying with the provisions of this law or the award of the board of arbitration. We feel that the unions and the employes involved, in taking this position, were entirely wrong, and that as a result of the position they have taken, and particularly their failure to comply with the requirement that a vote be taken before striking, has resulted in the loss of their status as employes.

The respondent unions contended also that the Wisconsin Employment Relations Law was unconstitutional. This Board is primarily an administrative board, and applies and administers the law as written by the legislature. The validity and constitutionality of legislative enactments is properly a matter to be passed upon by courts and not by an administrative board created by a law alleged to be unconstitutional. We, therefore, do not feel called upon to pass upon the question of constitutionality raised by the respondent unions.

The respondent unions also allege that this Board had no jurisdiction to hear and determine the matters raised by the company's complaint for the reason that the hotel was engaged in interstate commerce, and that all questions relating to relationship between employer and employes in such cases are under the jurisdiction of the National Labor Relations Board. Our first answer to this is that the evidence does not disclose that in the operation of the Plankinton House or the Kilbourn Hotel, there is any close and substantial relationship to interstate commerce. All of the business conducted by the hotel is local in character and in no way affects the free flow of commerce between states, in such a close and intimate fashion as to be subject to federal control.

853 In addition, the National Labor Relations Act has no provision, and congress has never attempted to legislate in reference to unfair labor practices committed by employes, and the administrative board enforcing such Act has continuously and constantly in many decisions taken the position that whether there are any such unfair practices by employes is not a question properly to be submitted to that Board but must be determined by some tribunal other than the National Labor Relations Board. Wisconsin, by the passage of the Wisconsin Employment Relations Law, has created a tribunal authorized to pass upon and determine questions raised by activities of employes, and it seems to us clear that any state, under its police powers, may regulate conduct of strikers so as to prevent a breach of the peace, assist in stabilizing relationship between

employer and employe, and protect the rights of employes who desire to do so, to work.

The respondent unions also contended that the employer in this case was guilty of certain unfair labor practices, that by reason of such practices did not come before the Board with clean hands, and that therefore the Board should dismiss the complaint. Some testimony was offered to substantiate the contention that certain unfair labor practices had been committed by the employer. It is clear, however, that in this case, the strike was not caused by reason of any such unfair labor practices, even assuming that the evidence might have been sufficient to have required this Board, in a proper proceeding, to order the employer to cease and desist such practices. We are not, at this time, stating that the evidence offered would have been sufficient for that purpose, but are merely stating that even though it would have been sufficient, it would not necessarily follow that the complaint must be dismissed.

This statement is made and is filed as a part of the record in this case for the purpose of briefly explaining the reasoning of the Board in arriving
854 at the conclusions it has arrived at, and in determining the order to be entered in this case.

Wisconsin Employment Relations Board,

By (Henry C. Fuldner)
Henry C. Fuldner, Chairman

(L. E. Gooding)
L. E. Gooding, Commissioner

(R. Floyd Green)
R. Floyd Green, Commissioner.

855-856 **AMENDMENT TO FINDINGS OF FACT AND ORDER.**

(Venue and title omitted)

A decision in the above-entitled matter having been made and filed on the 15th day of February, 1940, and it appearing that by inadvertence certain errors were made in Finding of Fact No. 26 and Conclusion of Law No. 4 in said decision.

Now, therefore, it is

Ordered

That said Fnding of Fact No. 26 and Conclusion of Law No. 4 be and the same are hereby amended to read as follows, to wit:

Finding of Fact No. 26.

On November 17, 1939, Thomas James, an employe of the Plankinton House was assaulted by Larry McAllen, a picket stationed at the hotel by the union, and said Larry McAllen was thereafter arrested, convicted and fined five dollars and costs.

Conclusion of Law No. 4.

That the following named persons, by reason of threats and assaults made by them to and on employes of the Plankinton House or persons seeking to do business with the Plankinton House, or by misdemeanors committed by them arising out of the controversy between the respondent unions and the complainant, Plankinton House Company, are guilty of unfair labor practices. Phil L. Val-

ley, Jack Heisdorf, Charles McLaughlin, Charles Alden, James C. O'Brien, John Thomas O'Maher, Joseph Hofich and Larry McAllen.

Given under our hands and seal at the City of Madison, Wisconsin, this 17th day of February, 1940.

Wisconsin Employment Relations Board,

By (L. E. Gooding)
L. E. Gooding, Commissioner

(R. Floyd Green)
R. Floyd Green, Commissioner.

857–860 **Direction of election.**

861–862 **Certificate of Wisconsin employment relations board.**

863 **Sample ballot.**

864–866 **List of eligibles.**

867–869 **Result and certification.**

Vol. II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 124

HOTEL & RESTAURANT EMPLOYEE'S INTERNATIONAL ALLIANCE, LOCAL No. 122, ET AL., PETITIONERS,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

PETITION FOR CERTIORARI FILED JUNE 3, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

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STATE OF WISCONSIN

IN SUPREME COURT

August Term, 1940

No. 68

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL NO. 122; PHIL L. VALLEY, JOHN ALEXANDER, and JACK HEISDORF, each individually, as business agent, organizer, and vice-president, respectively, for, and as representatives of all the members of Hotel & Restaurant Employees' International Alliance, Local No. 122;
INTERNATIONAL LAUNDRY WORKERS, LOCAL NO. 174;
BARTENDERS INTERNATIONAL LEAGUE OF AMERICA, LOCAL NO. 64, sometimes known as International Bartenders & Beverage Dispensers, Local No. 64;
INTERNATIONAL UNION OPERATING ENGINEERS, LOCAL NO. 311;
MILWAUKEE BUILDING TRADES COUNCIL
All affiliated with the American Federation of Labor,

Petitioners and Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD; HENRY C. FULDNER, individually and as chairman of, L. E. GOODING, individually and as a member of, R. FLOYD GREEN, individually and as a member of the Wisconsin Employment Relations Board;
PLANKINTON HOUSE COMPANY, a corporation,

Respondents and Appellees.

SUPPLEMENTAL CASE

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In view of the fact that the case compiled by the petitioners and appellants is incomplete and inaccurate and fails to fairly and fully set forth all that part of the record and evidence which the respondent, Plankinton House Company, deems material, it is necessary to file a supplemental case.

In the first place, although Plankinton House Company, a Wisconsin corporation, was the complainant before the Wisconsin Labor Relations Board and expressly made a party respondent by the Honorable Gustave G. Gehrz in the review proceedings had in the Circuit Court of Milwaukee County, Wisconsin, as per the order and judgment of said Court and as also shown by the notice of appeal to this Court, nevertheless the appellants failed to include the Plankinton House Company as a respondent and appellee in the title and caption of the printed case. It is, therefore, necessary to set forth the record pertaining to the propriety of our presence and the evidence covering other matters not fully reported. Mere misspelling of words and typographical errors appearing in the case have been ignored.

37-38 CIRCUIT COURT ORDER MAKING PLANKINTON HOUSE COMPANY A PARTY RESPONDENT

(Venue and title omitted)

Upon reading and filing the petition of Plankinton House Company, and it appearing to the Court that the Plankinton House Company desires to ap-

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pear in the above entitled matter and to submit oral arguments and written briefs in support of the constitutionality of the Wisconsin Employment Peace Act, the jurisdiction and the validity of the order of the Wisconsin Employment Relations Board, and all other pertinent issues arising in the above entitled matter.

NOW, THEREFORE, IT IS ORDERED that the Plankinton House Company be and hereby is permitted to appear in the above entitled action and
38 to submit oral arguments and written briefs in support of the constitutionality of the Wisconsin Employment Peace Act, the jurisdiction and the validity of the order of the Wisconsin Employment Relations Board, and all other pertinent issues arising in the above entitled action.

Dated this 8th day of April, 1940.

BY THE COURT:

GUSTAVE G. GEHRZ,
Circuit Judge.

58-89 CIRCUIT JUDGE'S MEMORANDUM DECISION

(Venue and title in which Plankinton House Company is expressly denominated "an intervening respondent" is omitted and only pertinent portions printed.)

These actions, instituted upon petitions for review, have been thoroughly presented on both facts and law on behalf of all immediate parties named
59 in the title and *others to whom due leave was*
60 *granted* (italics ours). * * * The attack upon the

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constitutionality of the "Employment Peace Act" now made was sought to be sustained in that suit (referring to the case of *Ward Whitney, et al. v. Local 122 of the Hotel & Restaurant Employees' etc. Alliance, et al.*, Case No. 169-311) but was expressly reserved for determination in the instant review proceeding with all, and not only a small number, of the parties vitally affected before the Court and accorded their just and adequate opportunity to be heard. * * *

91-95 JUDGMENT OF THE CIRCUIT COURT

(Venue and title in which Plankinton House Company is expressly named a respondent is omitted and only pertinent provisions printed.)

92 The petitioners appeared by Padway, Goldberg & Tarrell and the respondent, Wisconsin Employment Relations Board, appeared by John E. Martin, Attorney General, James Ward Rector, Deputy Attorney General, and N. S. Boardman, Assistant Attorney General. At the commencement of said hearing, Richardson, Robertson, Reeder & Stearns asked leave to appear as amicus curiae in this case, No. 170-382 and to file a brief for and on behalf of the Plankinton House Company; Shea & Hoyt asked leave to appear and file a brief amicus curiae for and on behalf of the Milwaukee Hotel Wisconsin Company in case No. 170-383; George E. Burns asked leave to appear amicus curiae and file a brief in the Plankinton House representation cases, Nos. 170-381 and 170-880; * * *

93 After opening statements as to the nature of the cases and the issues involved and *it appearing to*

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the court that the first three named firms might more properly appear for and on behalf of their clients as parties, said clients having been parties in the proceedings before the Board and *there being no objection thereto, the Plankinton House Company was made a party respondent in this case, No. 170-382, appearing by Richardson, Robertson, Reeder & Stearns by Mr. Herman M. Knoeller;* * * * (Italics ours).

95 Dated May 14, 1940.

BY THE COURT:

GUSTAVE G. GEHRZ,
Circuit Judge.

122-123 NOTICE OF APPEAL

(Venue omitted)

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL NO. 122; PHIL L. VALLEY, JOHN ALEXANDER, and JACK HEISDORF, each individually, as business agent, organizer, and vice-president, respectively, for, and as representatives of all the members of Hotel & Restaurant Employees' International Alliance, Local No. 122, et al.,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, et al., and
PLANKINTON HOUSE COMPANY, a corporation,

Respondents.

TO: JOHN E. MARTIN, Attorney General, Attorney for Wisconsin Employment Relations Board and the members thereof;

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RICHARDSON, ROBERTSON, REEDER & STEARNS, Attorneys for Plankinton House Company;
FRED JAEGER, Clerk of Circuit Court, Milwaukee County, Wisconsin:—

YOU WILL PLEASE TAKE NOTICE that the petitioners above named hereby appeal to the
123 Supreme Court of the State of Wisconsin from the Judgment, Orders, and Decrees made, rendered, and entered in the above entitled action in the Circuit Court for Milwaukee County, Wisconsin, on May 14, 1940, and from the whole and every part thereof.

YOU WILL TAKE FURTHER NOTICE that the petitioners further appeal from the order made and entered on May 17, 1940, by the Circuit Court for Milwaukee County, Wisconsin, limiting petitioners' conduct in the premises, and denying a stay of the Court's judgment, orders, and decrees, and from the whole thereof.

Dated this 18th day of May, 1940.

PADWAY, GOLDBERG & TARRELL,
Attorneys for Petitioners.

48-50 AFFIDAVIT OF GENERAL MANAGER FOR PLANKINTON HOUSE AND HOTEL KILBOURN AS TO CONTINUING MISCONDUCT OF UNIONS AND IN SUPPORT OF MOTION FOR IMMEDIATE ENFORCEMENT OF THE BOARD'S ORDER

(Venue and title omitted)

Hiram O. Wood, first duly sworn, deposes and says that he is General Manager of the Plankinton

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House and Hotel Kilbourn, owned and operated by the Plankinton House Company:

1. That the order of the Wisconsin Employment Relations Board dated February 15, 1940, was duly received on February 16, 1940, by the Plankinton House Company and as your affiant is informed and believes copies of said order were received by the respective respondents above mentioned on or about the same day.

49 2. That although more than a month has elapsed since receipt of said order, the respondents above mentioned have failed, neglected and refused to comply therewith and contrary to the provisions of said order, have continued to maintain pickets at all the entrances to the Plankinton House and the Hotel Kilbourn owned by Plankinton House Company; the number of such pickets so maintained from day to day ranged from one to twenty-two and the respondents above named still continue to interfere with the patrons and prospective guests of the Plankinton House Company, to boycott and interfere with deliveries to and from the places of business of the Plankinton House Company and continue to engage in other concomitant actions of a strike in defiance of the Board's order. Thus:

(a) On numerous occasions since February 16, 1940, to date the pickets parading before the entrances of the hotel have shouted at patrons and prospective guests the following language, "This is a scab hotel"; "There are 27 other good union hotels in Milwaukee, nobody but scabs come in here."

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(b) Between February 15 and March 11, 1940, on several occasions the pickets parading in front of the entrances of the Hotel Kilbourn have stopped prospective guests who were about to enter the hotel and diverted them from patronizing the hotel by saying, "Why stay at a scab hotel when there is a good union hotel, the Medford, just across the street?"

(c) On February 16th at about 10:00 o'clock in the evening approximately twenty-two pickets paraded at the different entrances of the Plankinton House and booed, shouted and jeered at both guests and employees entering and leaving the hotel for almost an hour.

(d) On February 22, 1940, at about 6:00 o'clock in the evening when the Lions Club was holding a party in the Sky Room of the Plankinton House three or four pickets became very boisterous and sneered at the guests and employees of the hotel at the same time shouting "scab hotel."

50 (e) On February 22, 1940, at about 10:00 o'clock in the evening a guest of the Plankinton House sought to enter the same but was surrounded by the pickets, booed and jeered to such an extent that he complained very bitterly to the management of the hotel and the police.

(f) Since February 15th almost every weekday the Express Company has complained that the deliveries at the back door of the Plankinton House have been impossible because of interference on the part of the pickets who have ordered the Ex-

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press Company to stop delivering at the entrance. In a great many cases guests of the hotel have been required to call at the Express Company office for large, bulky and heavy packages and bring them to the hotel themselves at the expense of cab fare and their own time. In other cases it has been necessary for the hotel to send their truck to the Express Company to get deliveries for which the Express Company had already been paid at considerable increased cost to the Plankinton House Company.

3. The failure of the above mentioned respondent unions, their officers and members, to comply with the order of the Board has seriously affected the business of the Plankinton House Company and is causing considerable loss in business and revenue and unless the picketing, boycotting and interference with the deliveries are immediately restrained, an incalculable loss in business, patronage and revenue will be suffered by the Plankinton House Company, for already five conventions and innumerable dinner parties have been diverted by union interference from the Plankinton House.

HIRAM O. WOOD (Signed).

(Jurat omitted.)

103-109 AFFIDAVIT OF GENERAL MANAGER FOR PLANKINTON HOUSE AND HOTEL KILBOURN AS TO CONTINUING MISCONDUCT OF UNIONS AND IN OPPOSITION TO MOTION FOR STAY

(Venue and title omitted)

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HIRAM O. WOOD, being first duly sworn, on oath, deposes and says that he is General Manager of the Plankinton House and the Hotel Kilbourn, owned and operated by the Plankinton House Company:

1. That from May 15, 1939, to July 11, 1939, negotiations were carried on for the amicable settlement of the differences existing between the Plankinton House Company and the above mentioned unions relating to a new labor contract, but that said negotiations were cancelled by the attorneys for the above named unions who demanded arbitration by their written letter dated July 11, 1939.

104 2. That from July 11, 1939, to October 30, 1939, the labor controversy existing between the Plankinton House Company and the above named unions was submitted to a board of arbitration, which, on the last mentioned date, rendered an award which was accepted as final and binding by the Plankinton House Company.

3. That the above named unions refused to accept the arbitration award, and that ever since November 2, 1939, when a strike was called by the above named unions, the said unions, their officers, members, and agents have engaged in, promoted, and induced picketing, boycotting, and other overt concomitants of a strike without a majority in a collective bargaining unit of the employees of the Plankinton House Company against whom such acts were primarily directed having voted by a secret ballot to call said strike.

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4. That by reason of the acts of violence and unfair labor practices committed by the aforesaid unions, their officers, members, and agents, the Plankinton House Company on November 20, 1939, petitioned the Wisconsin Employment Relations Board for relief, and that upon issue joined by said unions the entire labor controversy between the parties involved was fully heard and finally determined by the order of the Wisconsin Employment Relations Board dated February 15, 1940, and duly received on February 16, 1940, by the Plankinton House Company and, as your affiant is informed and verily believes, copies of said order were received by the respective petitioners above named on or about the same day.

5. That by the last mentioned order of the Wisconsin Employment Relations Board, petitioners were found guilty of unfair labor practices and, among other things, directed to immediately cease and desist from:

(a) Engaging in, promoting, or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;

(b) Attempting to hinder or prevent by threats, intimidation, force, or coercion of any kind the pursuit of lawful work by the employees of the Plankinton House Company;

105 (c) Boycotting in any way the Plankinton House Company.

6. That on February 24, 1940, the above named unions petitioned the Circuit Court of Milwaukee

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County for a review of the Board's order and on March 16, 1940, the Attorney General of the State of Wisconsin petitioned the same Court for enforcement of said order.

7. That on May 14, 1940, after extensive oral and written argument filed by counsel in the matter, this Court sustained, confirmed, and ordered enforced in full the Findings of Fact, Conclusions of Law, and the final Order of the Wisconsin Employment Relations Board dated February 15, 1940, and, among other things, further specifically ordered and decreed that the above named petitioners immediately cease and desist from:

(a) Engaging in, promoting, or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;

(b) Attempting to hinder or prevent by threats, intimidation, force, or coercion of any kind the pursuit of lawful work by employees of the Plankinton House Company;

(c) Boycotting in any way the Plankinton House Company.

8. That on the same day that this Court signed and entered its judgment, all the above named unions and individuals designated petitioners procured an order to show cause from the above Court returnable on May 16, 1940, at 2:00 o'clock in the afternoon, why a stay of the judgment and orders made and entered by this Court should not be granted based upon the affidavit of Phil L. Valley, who is Business Manager of Local 122, Hotel & Restaurant

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Employees' International Alliance, and was specifically found guilty by the Wisconsin Employment Relations Board and the Circuit Court of Milwaukee County of unfair labor practices and illegal conduct on several occasions during the course of the labor controversy existing between the parties.

9. That although almost three months have elapsed since the receipt by the above named labor unions, their officers, members, and agents of the order of the Wisconsin Employment Relations Board,
106 and although the said parties, upon information and belief, know the decision of this Court and the judgment thereof directing them to immediately cease and desist from engaging in, promoting, or inducing picketing at or near the Plankinton House or the Kilbourn Hotel of attempting to hinder or prevent by threats, intimidation, force, or coercion of any kind the pursuit of lawful work by employees of the Plankinton House Company or boycotting in any way the Plankinton House Company, the said unions, their officers, members, and agents thereof have failed, neglected, and refused to comply with the order of said Board and the judgment of this Court and, contrary to the provisions thereof, have continued to maintain pickets at all the entrances of the Plankinton House and the Kilbourn Hotel; that the number of said pickets so maintained from day to day ranges from one to twenty-two and the above named petitioners still continue to interfere with the patrons and prospective guests of the Plankinton House Company, to boycott and inter-

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fere with the deliveries to and from the places of business of the Plankinton House Company, and continued to engage in overt concomitant acts of a strike, to-wit:

(a) On numerous occasions since February 16, 1940, and to date the pickets parading before the three entrances of the hotel and carrying placards have shouted at patrons and prospective guests of the hotel the following language: "This is a scab hotel; there are twenty-seven good union hotels in Milwaukee; nobody but scabs come in here."

(b) Between February 15th and March 11, 1940, on several occasions the pickets parading in front of the entrances of the Kilbourn Hotel have stopped and prevented prospective guests who were about to enter the hotel and diverted them from patronizing the hotel by saying, "Why stay at a scab hotel when there is a good union hotel, the Medford, just across the street?"

(c) On February 16, 1940, at about 10:00 o'clock in the evening when guests were about to retire, aproximately twenty-two pickets paraded in close formation and in a boisterous manner before the
107 different entrances of the Plankinton House and booed, shouted, and jeered for almost an hour at both the guests and the employees entering and leaving the hotel.

(d) On February 22, 1940, at about 6:00 o'clock in the evening when the Lions Club, a Milwaukee service club, was holding a party in the Sky Room of the Plankinton House, three or four of the pickets

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paraded before the entrances of the hotel in a militant and boisterous manner sneered and shouted, "Scab hotel, scabs" at the guests and employees of the Plankinton House.

e) At about 10:00 o'clock in the evening of the same day, February 22, 1940, a guest of the Plankinton House sought to enter the same but was surrounded by the pickets, denounced, booed, and jeered at by them to such an extent that he became intimidated, sought the aid of the police, and complained bitterly to the management of the hotel.

(f) Since February 15, 1940, almost every weekday the express company and other private transportation companies have complained that deliveries at the rear entrance of the Plankinton House have become practically impossible because of the interference and obstruction on the part of the pickets who have ordered the express company and other transportation companies to cease deliveries at the hotel; many guests of the hotel have been greatly inconvenienced and forced to call at the express company office themselves for large, bulky, and heavy packages and bring them to the hotel with the attendant additional expense and loss of time; on other occasions it has been necessary for the hotel to send their own truck to the express company or other transportation companies to obtain deliveries of packages and trunks, for which the express company or other transportation companies have already been paid, all to the increased cost and expense of the Plankinton House Company.

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Thus, on May 5, 1940, a guest of the Plankinton House, a traveling man, attempted to check his trunk with the North Shore Railway at Chicago,
108 Illinois, for through delivery to the Plankinton House but was informed that the said carrier could not accept the same because of the strike condition and picketing at the point of delivery.

10. That the failure of the above mentioned unions, their officers, members, and agents to comply with the order of the Wisconsin Employment Relations Board, confirmed by the judgment of this Court, has seriously affected the business of the Plankinton House Company and is causing it considerable loss in business and revenue, and unless the illegal conduct, unfair labor practices, picketing, boycotting, and interference with the business, guests, employees, and especially deliveries to and from said hotel are immediately restrained, incalculable loss and irreparable damage are being and will be suffered by the Plankinton House Company and greater injury will be inflicted upon the Plankinton House Company by granting a stay of enforcement of the orders of the Wisconsin Employment Relations Board and the judgment of this Court than will be inflicted upon the above named unions and petitioners by a denial of such stay; that despite the presence twenty-four hours of each day of police officers charged with the duty of protecting the Plankinton House Company's property, guests, employees, and suppliers, numerous acts of violence, breach of the peace, crimes, and misdemeanors have been committed by the above namd unions, their

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officers, members, and agents as set forth in the Findings of Fact, Conclusions of Law, and final Order of the Wisconsin Employment Relations Board and the written decision of this Court, and that said unfair labor practices and illegal conduct still continue, to-wit:

(a) About fourteen conventions and innumerable dinner parties have been diverted from the Plankinton House by union interference, intimidation, picketing, boycotting, and coercion since the calling of the strike by the unions above named. Among the numerous instances thereof, your affiant specifies the following:

(1) On March 5, 1940, the state convention of a large service club, the Optimist Club, although definitely committed and contracted for the Plankinton
109 House Company, was cancelled by reason of the acts of the above named unions.

(2) In the last week of April, 1940, the annual convention of a large insurance company, Travelers Protective Association, which had been definitely arranged for the Plankinton House where it had been held for the last five years, was cancelled by reason of the acts, especially the illegal picketing, of the above named unions.

(3) On about May 1, 1940, John Alexander, an organizer for the Hotel & Restaurant Employee's International Alliance, Local No. 122 mentioned above, together with representatives of the Inside Workers Union and the Laundry Drivers Union, urged the officers of the Wisconsin State Laundry

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Owners Association to cancel their valid existing convention contract or reservations for rooms, lunches, and dinners had with the Plankinton House Company.

(b) During the week of May 6, 1940, the pickets parading in front of the entrances of the Plankinton House were militant and boisterously shouted at patrons and prospective guests the following language: "Scabs, this is a scab hotel, nobody but scabs come in here."

(c) Picketing by the above named unions still continues at all the entrances of the Plankinton House and the Kilbourn Hotel and on May 15, 1940, there were from one to four pickets at each of the three entrances of the Plankinton House and at each of the two entrances of the Kilbourn Hotel.

11. That this affidavit is made for the purpose of informing the Court of the true state of facts and in opposition to the motion of the above named unions for an order staying the enforcement of the final order of the Wisconsin Employment Relations Board and the judgment of this Court.

HIRAM O. WOOD (Signed).

(Jurat omitted.)

JOHN ALEXANDER

(Union Chairman of the Strike Committee)

called adversely as a witness on behalf of the complainant, having been first duly sworn, on oath testified as follows (only pertinent omitted matters printed):

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Adverse Examination, by Mr. Knoeller.

232 I paid James O'Brien on one occasion on picket duty and also sent Charles A. McLaughlin to supervise the pickets and see to it that peace was maintained. I also directed Jack Heisdorf in the same spirit at the picket lines at the Plankinton Hotel and Kilbourn Hotel. I also directed Thomas O'Mahar to perform picket duty at the hotels and instructed him together with Larry McAllen and Joseph Hofich how to act on the picket line. * * *

233 Joseph Hofich still occasionally does picket duty
234 as a supervisor of the picket line. Several of the pickets mentioned have been arrested for disorderly conduct on the picket line and after their arrest were returned to the picket line. Jack Heisdorf, Charles McLaughlin, Larry McAllen, Joseph Hofich, and Thomas O'Mahar are still members of the union and in good standing.

Cross-Examination, by Mr. Goldberg.

235 Q. How did James O'Brien get on the picket line?

A. O'Brien came to me, he asked me if I were the chairman of the strike committee and if I had authority to pay pickets. I said "Yes." He said, "Well, I have been picketing." I said, "I don't know you. I got to check up on you, see who you are before I can consider you as a picket." When he told me his story—when I checked up that he was a member of our local before, but he wasn't a member then, and when this thing happened, told

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him that "You can't go any more on the picket line." I paid him off then and there and since that time I know O'Brien hasn't been on the picket line. I saw to it.

245-246 JOSEPH MUELLER

called as a witness on behalf of the complainant, being first duly sworn, on oath testified as follows (only pertinent omitted matters printed):

Direct Examination, by Mr. Knoeller.

There were about fifteen pickets present at the time. They didn't say anything to me. Charles McLaughlin and John Heisdorf both took a swing at me and destroyed the floral decorations that I was carrying.

273 PEGGY HEHMEYER

called as a witness on behalf of the complainant, having been first duly sworn, on oath testified as follows (only pertinent omitted matters printed):

Cross-Examination by Mr. Goldberg.

The Plankinton Hotel gave a banquet or turkey dinner during the life of the union contract before the Thanksgiving dinner in 1939. The employees were permitted to have turkey every Christmas, every Thanksgiving Day since I have been there.

280 WAYNE BANNING

called as a witness on behalf of the complainant, having been first duly sworn, on oath testified as follows (only pertinent omitted matters printed):

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Direct Examination, by Mr. Knoeller.

I saw Charles Alden, a picket, strike Robert Jeske three blows with his clenched fist. I was standing directly in front of him. Alden had his arm around Jeske's neck and was poking him in the ri s when I came up.

296-297 KARL WERWATH

called as a witness on behalf of the complainant, being first duly sworn, on oath testified as follows (only pertinent omitted matters printed):

Direct Examination, by Mr. Knoeller.

The young men (from union headquarters) gave us a deadline as to when these boys (School of Engineering students working at the Plankinton Hotel) would have to stop working. Mr. Valley reiterated the same definite statement as was made by the young man and he further mentioned that these boys by not working, by not stopping work would probably jeopardize their future opportunities for work in any situation where a union might be in control of that work.

430-465 HALSEY COREY

called as a witness on behalf of the independent union, having been first duly sworn, on oath testified as follows (only pertinent omitted matters printed):

Direct Examination, by Mr. George Burns.

I am employed at the Plankinton House as an assistant engineer. I am the president of the inde-

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431 pendent union of the employees of the Plankinton House Company. The independent union was organized when a large number of employees that stayed in the Plankinton Hotel at the time the strike was called wanted to work peacefully and talked about what could be done to bring relief to the situation caused by the strike. We felt that one of of the best things that could be done would be to organize an independent union. I was personally active in the commencement of the independent organization. To find out what the other employees in the hotel thought about it, I and some of the other employees drafted a petition giving several of us a right as a committee to investigate the matter and see what could be done legally and we circulated the petition among the employees for signatures to see if we had the backing of the people. George Andrew, Gene Restahe, Ward Whitney, and I were named as the committee on the petition which
432 authorized us to investigate and engage legal counsel. Seventy-four of the employees of the Plankinton House signed the petition and we then engaged George Burns as our counsel.

At our first conference with Attorney Burns we (that is, the four committeemen) asked him if we had the right to form an independent organization and what steps were necessary to proceed therewith. We were advised that we did have the right to form an independent organization under the law and it could be any type of organization that we choose, but we were also advised very strictly

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that if the management had anything to do with it, had any connection with it whatsoever, that it would be outlawed.

Thereafter we decided to have a general meeting of the employees who signed the petition and mailed notices to that effect. We held the meeting at Kes-
433 selman Hall located at Mason and Broadway. Exhibit 27 is the minute book of the independent organization of the Plankinton House employees and the minutes of that meeting were signed by Merrill Sutherland, Secretary, and I as President and the minutes correctly represent what took place at that meeting. (Exhibit 27 admitted into evidence without objection.) There were approximately sixty-five employees of the Plankinton House present at that meeting. We presented mem-
434 bership cards to those present and they were signed by all the employees present and the minutes show that the membership cards were all acted upon and those present became members of the independent organization of the Plankinton House employees. We then elected officers. I was elected President, Jack Brownrigg Vice-President, Merrill Sutherland Secretary, George Andrew Treasurer, and on the bargaining committee were Hollis Stenchel and Adolph Heitman, Ward Whitney, Edna Hall, and Edward Knopf. Exhibit 28 consists of a pack of membership cards and are the cards that the employees signed making application for membership in the independent union. There are one hundred eighteen (118) of those cards and I personally

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know that each one who signed a card is an employee of the Plankinton House Company.

435 After the first organization meeting we asked the people that had not been present at the meeting but who were working and others who came back to work if they wanted to join our organization. Sixty-five out of our one hundred eighteen members joined after the first organization meeting. The members are employees of the Plankinton House Company working at the Plankinton House, the Kilbourn Hotel, and at the Plankinton parking stations.

Exhibit 29 is the Articles of Organization and By-
436 Laws of the independent union which were adopted at our first meeting.

At the meeting we first inquired of those present if they wanted to form an independent organization and asked for a discussion and there was quite an expression from those present strongly in favor of having an independent organization. None present opposed the organization. Then the Articles of Organization and By-Laws were read to the meeting, first entirely before passing upon the separate sections, and then separately. There were a number of suggestions from those present with reference to
437 additions and changes in the Articles and By-Laws and those additions and changes were finally adopted and are now set forth in detail in the organization minutes.

Exhibit 30 is the original petition that we circulated to find out if the people were interested in forming an independent organization and the sig-

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natures appearing thereon are of people who were working in the Plankinton Hotel at the time and that had been working there before the strike was called. (Exhibits 29 and 30 admitted into evidence.)

After we had completed our organization and secured a meeting of members who had not attended the first meeting we then had a meeting of the supreme council to formally accept the members.
438 The supreme council consists of nine members being the officers and the bargaining committee. Thereafter, approximately the 25th of November, when we thought we had a majority of the employees eligible to belong to the organization and had been employees prior to the strike we went to the management and asked for recognition of our independent union. Our first organization meeting was on November 21st and approximately a week after that we claimed to have a majority of the employees of the Plankinton House Company.

Exhibit 31 is the recognition agreement signed by E. L. Richardson, President of the Plankinton House Company, John Van Houten, Secretary of the Plan-
439 kinfon House Company, and Merrill Sutherland, Secretary, and Halsey Corey, President, on behalf of the employees.

(Exhibit 31 dated December 1, 1939, being a memorandum recognizing the independent union of the Plankinton House employees as the sole bargaining agent for all employees of the company, they appearing to have a majority of the employees of their company, together with all the other exhibits of-

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fered by the independent organization up to and including Exhibit 31, were thenreceivedinevidence.)

Cross-Examination, by Mr. Goldberg.

I have worked six years at the Plankinton House Company. I was a member of the Brotherhood of Firemen, Oilers, & Maintenance Men, Local 125, a recognized A. F. of L. union. I didn't know if the
440 management of the hotel had a contract with this union, but I did know that the management had a contract with other labor organizations at the hotel. So did the members of our bargaining committee and officers and we discussed that with Attorney Burns. We understood that there had been a contract signed with the hotel with this other labor organization but that it had terminated this summer some-
441-2 time, and we so told Mr. Burns. No explanation was made to the independent employees or signers of the membership cards that if the contract with the A. F. of L. continued until June 15, 1940, they would have to belong to the A. F. of L. unions covering their employment in order to work at the Plankinton House.

The demand made on the Plankinton House management to recognize our independent organization as the bargaining representative was in the form of a contract agreeing to enter into collective bargaining with the independent organization recognizing that we had a majority of the employees of the Plankinton House Company. The committee of
443 the independent union presented the contract in

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444 person. We first saw Mr. Wood. We presented to him our case, showed him our membership cards showing a majority and asked him to sign the contract recognizing us as the bargaining agent. Mr. Wood didn't sign it the day we first brought the contract to him. He said he would have to take it up with the attorney.

445 There was considerable discussion over whether we had a majority of the employees or not but we established it by our membership cards.

446 Outside of the conference with Mr. Wood in respect to the independent representing a majority of the employees, we had a conference with Mr. Richardson. This last conference took place three or four days after we had talked to Mr. Wood and was not the day the contract was signed. The conference with Mr. Richardson lasted, possibly an hour. We discussed the percentage of membership.
447 After the management had checked their records to make sure that the membership of the independent union shown by our membership cards represented a majority of the employees of the Plankinton House, it then signed the recognition contract. Thereafter the independent union signed the recognition contract represented by Exhibit 31.

448 The reason why we brought in parking station employees with hotel employees of the Plankinton House Company was because they composed one unit of the company as advised by our attorney, Mr. Burns.

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449 The Plankinton House Company had nothing to do with the organization of the independent union.

450 Neither Mr. Richardson nor Mr. Wood stated that they had a contract with the bartenders' union, the building trades employees, local 311 International Union of Operating Engineers, and, therefore, could not include the bartenders, building trades employees, or engineers in our unit, nor did they state that
451 the arbitration award had no bearing upon the relationship between the hotel and Local 64, Bartenders' Union, or Local 311, Engineers' Union, or Milwaukee Building Trades Council, nor did they state that they couldn't recognize the independent union because hey had a strike with Local 122, Hotel & Restaurant Workers, who were claiming that a contract exists or that there was a question of representation rights with another union or unions. The question of rates of pay, wages, hours of employment, or other conditions of employment was covered in the recognition contract. Neither Mr. Rich-
452 ardson nor Mr. Wood told us that Phil Valley had written them claiming a contract and that the recognition of any other union would be a violation of the contract and, therefore, the hotel could not recognize the independent union. The independent union committee saw Mr. Wood and Mr. Richardson dur-
453 ing working time. We were not docked wages because of the time lost in those negotiations. The independent union employees reached the Kesselman hall where they held their first organization meeting by taxicab. The taxicab fare was paid by

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the employees individually. The employees also paid for the hall from collections of initiation fees at the hall that night. Neither Mr. Wood nor Mr. Richardson told us the hotel had proceedings pending before the Wisconsin State Labor Relations Board and until a hearing was had and determination made they couldn't recognize us as representatives of the employees.

454 I was present on Thanksgiving Day at the Plankinton Hotel when all the employees were invited to a turkey dinner. Mr. and Mrs. Wood were present
455 as also Mr. and Mrs. Hoffman. I worked at the Plankinton House for nearly six years and we always had turkey on Thanksgiving, but on this day we had a dinner for all the employees collectively. This Thanksgiving turkey dinner did not in any way influence me in the formation of this union.

456 At the time the petition was circulated and the membership cards in the independent union were signed some of the employees inquired about a job after they left the Plankinton House if the independent union was recognized. They were told that in our opinion anybody that was capable of holding a job and applying for one would be able to find work.
457 There was a question asked as to the effect of joining a company union would have upon their ability to work any place in the city where the A. F. of L. had contacts. It was answered by saying that it was up to them—if they were able to find employment, they certainly would be able to work. I was never told that if I stuck to the Plankinton House I

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would have a lifetime job, nor did I hear any other employees so informed by Mr. Wood or anyone else.
458 Neither Mr. Wood nor anyone else ever told me or any other member of our independent union that I know of that the hotel would never sign with the A. F. of L. union but would fight it until it broke it or that the Plankinton House Company was rich enough to fight the union until they broke them.

When we spoke to Mr. Richardson and Mr. Wood about the amount of membership in our union, we first were considering only the employees of the Plankinton Hotel and they told us that we would have to consider the whole bargaining unit and that we didn't have a majority of the employees at the time of the first conference. We then conferred with our attorney who investigated the matter. Mr. Richardson and Mr. Wood did not say that we had to con-
459 sider all the Plankinton House Company employees but that there might be some question as to whether the complete bargaining unit wouldn't have to be included. They said that the hotels' attorneys would raise that question.

Re-Direct Examination, by Mr. Burns.

When I first spoke to Attorney Burns I did not know that the the Plankinton House Company also employed those at the Kilbourn Hotel and those at the parking stations and it was after I learned that I then sought the members in the Kilbourn Hotel and the parking stations for our independent union or-
460 ganization. After I had learned that fact Mr. Burns

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advised me that all persons working for a single company were considered a bargaining unit. We then secured members from the employees of the Kilbourn Hotel and from the parking stations.

461 (Exhibit 32 being a copy of the recognition contract with the following words endorsed thereon: "Delivered by Mr. Burns and committee to H. O. Wood on November 27, 1939, 4:15 P. M." offered and received in evidence; Exhibit 33 being the bank book of the independent organization of the Plankinton House Employees at the First Wisconsin National
462 Bank of Milwaukee, Wisconsin; Exhibit 34 being the check stub book of the independent organization; Exhibit 35 being a partial list of those who paid in the independent organization; Exhibits 36 and 36(a) being two receipt books of the Treasurer of the independent organization of the Plankinton House employees; Exhibit 37 being ledger of the individual members of the independent organization; Exhibit 38 being expense ledger of the independent organization identified by witness, all offered and received in evidence.)

463. *Re-Cross Examination, by Mr. Goldberg.*

Neither Mr. Wood nor Mr. Richardson read Section 111.02(6) of the Statutes relating to collective bar-
464 gaining to me. Mr. Burns didn't read the above section of the law but he did discuss it with us to the effect that all the employees of one company constitute a bargaining unit unless the employees themselves determine otherwise.

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After the first meeting of November 21st and after
465 our conference with Mr. Wood and Mr. Richardson, we did not call another meeting of the membership.

CAPTAIN JOHN W. POLCYN

called as a witness on behalf of the respondents, having been first duly sworn, on oath testified as follows (only pertinent omitted matters printed):

Re-Cross Examination, By Mr. Knoeller.

617 We have had six policemen stationed about the Plankinton Hotel right from the very start of the strike on November 2, 1939, and in addition we had men on horseback there several times who also patrol the district and check traffic conditions. Several times when a delivery was desired to be made to the hotel or from the hotel, we sent down more policemen in addition to the six present as a matter
618 of precaution. We would borrow the policemen from the Kilbourn Hotel or from the Wisconsin Hotel and send about three or four additionl. Despite all these policemen about the hotel since November 2nd at the three entrances of the hotel, it is evident that the assaults and batteries related by me occurred.

DAN SAN MIGUEL

called as a witness on behalf of the respondents and having been duly sworn, on oath testified as follows (only pertinent omitted matters printed):

Examination, by Commissioner Gooding.

626 Q. Was the talk between you and Mr. Wood down in the locker room friendly?

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A. Oh, very friendly talk. It was a friendly talk.

Q. And what about your—had there been—it wasn't friendly when you were talking upstairs at the desk, was it?

A. Well, he didn't give me a chance to talk. He just bawled me out right away. He didn't give me a chance to explain or say anything.

Q. And then when you went downstairs that was all over and you just talked in a friendly manner?

A. Yes.

641 CLARK M. ROBERTSON:

(Stipulation between counsel.)

MR. GOLDBERG: Yes, if you will tell me off the record we can stipulate, otherwise I may want to call you to the stand.

MR. ROBERTSON: I am not going to answer it that way. I am perfectly willing to tell my conversation with Mr. Luecki. Mr. Luecki made two suggestions, as I recall. One was that he talked to Mr. Rauch, I believe, who is now on the Industrial Commission, or was—I don't know—and he wanted to know whether there had been any meeting since the strike had been called, and I said there had not, and he wanted to know if there would be any objection to a Mr. Rauch coming into the picture with a view to seeing if Mr. Rauch would conduct some sort of an election. I took it from his conversation he hadn't talked to Mr. Rauch and I told Mr. Luecki we would be glad to consider anything pertaining

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to the situation at the hotel. He then asked me what the point in dispute—whether there was anything—whether the matter could be mediated in
642 any way and I told him the dispute, as far as we were concerned, was a clear-cut dispute on the issue of a closed shop under the terms of the arbitration award; that the union had indicated that it was very firm in its position and that we were very firm in our position. Accordingly, I didn't see that at the time there was any purpose to be served by any meeting on that issue.

MR. GOLDBERG:

Q. And that has existed to date?

MR. ROBERTSON: Yes.

MR. GOLDBERG: Well, that—I would be willing to stipulate that substantially that was your position without asking Mr. Robertson to take the witness stand.

MATT PECKMAN

called as a witness on behalf of the respondents, being first duly sworn, on oath testified as follows (only pertinent omitted matters printed):

Direct Examination, by Mr. Goldberg.

715. Mr. Wood told me that if the union didn't let the boy who was applying for the job as assistant houseman join the union, then we would be without an assistant houseman. I don't recall Mr. Wood ever speaking to me about not applying to the union for help.

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JOHN ALEXANDER

recalled as a witness on behalf of the respondents, having been previously first duly sworn, on oath testified as follows (only pertinent omitted matters printed):

Direct Examination, by Mr. Goldberg.

727 I am a member of the Hotel & Restaurant Workers' Union since last July when I led the C. I. O. Union into the A. F. of L. * * * I was invited by the C. I. O. to organize for the C. I. O. I did organize for the C. I. O. The C. I. O. got to be a 500 membership. I was President and Business Manager until I discovered that the C. I. O. was under the—rather the executive board within the C. I. O. was, out of twelve members, nine were members of the Communist Party, and it was under Communist domination and I decided to break away from the C. I. O. and I accomplished this after a long fight, to take them into the A. F. of L., and to my knowledge I think it is the first C. I. O. that did abscond from the C. I. O. to go into the A. F. of
728 L. I have worked in this industry in different parts of the country, such as San Francisco, New York, and Detroit.

Cross-Examination, by Mr. Knoeller.

741. I was connected with the C. I. O. until February 14, 1937.

742. Q. Now you have always advocated, haven't you, peaceful picketing and peaceful persuasion?

A. Yes, sir.

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Q. You have been quite a philosopher along that line, haven't you?

A. Yes, sir.

Q. Isn't it a fact, Mr. Alexander, you were in charge of the sitdown strikers who took possession of the Milwaukee Athletic Club and held its property in the year 1936?

MR. GOLDBERG: Just a minute. This isn't proper cross-examination, nor is the matter germane to this issue.

COMMISSIONER GOODING: May answer it.

A. We did not take possession of anything, Mr. Knoeller.

743. MR. KNOELLER:

Q. What year was that the M. A. C. had their labor trouble?

A. That was in 1937.

Q. And you were in charge of the pickets, weren't you?

A. Yes, sir.

Q. And there was a sitdown strike there, wasn't there?

A. Yes, but I did not—

Q. That's all.

A. Yes, O. K.

744 Irrespective of whether there is a particular clause in the hotel contract exempting the students or not from joining the union, as a matter of privilege to the students and the management we let
745 them work without joining the union. This was a

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gentlemen's oral agreement. This is true although I know that the hotel contract does not provide any specific exemptions for students. These subsequent
746 arrangements changing the express letter of the contract permitting students to work without joining the union are usually negotiated or performed by the Business Agents who are to keep an eye on those things and see to it that this oral agreement is carried out.

768-769. (Stipulation by counsel for the union that there is nothing in the union labor contract giving the union Business Agents free access to go into the hotel and the departments thereof to see who works there.)

PEGGY HEHMEYER

called in rebuttal on behalf of the complainant, having been previously sworn, on oath, was examined and testified as follows (only pertinent omitted matters printed):

Direct Examination by Mr. Knoeller:

777 I did not state to Margaret Thie or the girls that I didn't believe the union could do anything for the girls and if they had any request to make they should go to Mr. Wood.

779. I did not say to Margaret Thie or to anyone else on November 17th or any other time that the girls were fools for staying outside and sticking with Phil Valley, that he was a gangster and a racketeer and had changed his name three times and that the girls were more or less branded for being outside or they

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would have a hard time finding another job or that they were more or less branded as trouble-makers and that the girls that stayed inside would naturally get the cream of the crop after everything was going in full swing and they would have a lifetime job.

780-781 I did tell Mrs. Ruth Fairweather if she wanted to come back she would be given a room if she was in any way afraid to come in and go out of the hotel. This was said after Ruth Fairweather had come to the hotel pursuant to a telephone call she had made in advance. I told her that she had to decide for herself whether she wanted to work or stay outside. She stated that she had not come in the day before because she didn't know if she was doing the right thing by staying out.

Cross-Examination, by Mr. Goldberg.

801 Helen Martel was supposed to work Saturday and Sunday and she didn't work either day but she notified me or her husband notified me on M nday she wouldn't be in. It was the 30th of October that her husband called me—Teachers' Convention was on November 3rd.

HIRAM O. WOOD

recalled as a witness on behalf of complainant, having been previously duly sworn, on oath testified as follows (only pertinent omitted matters printed):

Re-Cross Examination by Mr. Goldberg.

827 Exhibit 67 (printing company bill) is our invoice and it has my O. K. on it.

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828-829 John Heisdorf knew of my arrangement with Mr. Bournak in relation to delinquent payment of dues and also the matter of going into the departments and that the privilege would be given us to choose our own employees provided they join the union. Mrs. Heisdorf confirmed that understanding.

868-869 CERTIFICATION OF REPRESENTATIVES

(Venue and title omitted)

The Wisconsin Employment Relations Board, having held a hearing on petition for determination of representatives of the employees of the Plankinton House Company, Milwaukee, Wisconsin, pursuant to Sec. 111.05 Wis. Stats., and the Board having issued on February 15, 1940, an Order and Direction of Election, and having conducted on February 29, 1940, an election by secret ballot, and having found that the results of the election were as follows:

1. Total number of eligible to vote..... 145
2. Total ballots cast..... 135
3. Total ballots void..... 1
4. Total valid ballots cast..... 134
5. Ballots cast for Independent Organization of the Plankinton House Company Employees, an unaffiliated labor organization.. 130
6. Ballots cast against Independent Organization of the Plankinton House Company Employees, an unaffiliated labor organization.. 4

Now, therefore, by virtue of and pursuant to the power vested in the Wisconsin Employment Relations Board by Sec. 111.05 (3), Wis. Stats.,

Page of Record.

869 IT IS HEREBY CERTIFIED that the Independent Organization of the Plankinton House Company Employees, an unaffiliated labor organization, has been selected by a majority of the eligible employees of the Plankinton House Company, Milwaukee, Wisconsin, who voted at said election, in the unit consisting of all employees, excluding officers, directors, executives, and supervisors, as their representative for the purposes of collective bargaining, and that pursuant to the povisions of Sec. 111.05, Wis. Stats., said Independent Organization of the Plankinton House Company Employees, an unaffiliated labor organization, is the exclusive bargaining representative of all such employees for the purposes of collective bargaining in respect to rates of pay, wages, hours and other conditions of employment.

Given under our hand and seal at the City of Madison, Wisconsin, this 6th day of March, 1940.

WISCONSIN EMPLOYMENT RELATIONS BOARD

By Henry C. Fuldner
Henry C. Fuldner, Chairman

L. E. Gooding
L. E. Gooding, Commissioner

R. Floyd Green
R. Floyd Green, Commissioner

(Seal of Wisconsin Employment Relations Board)

Page of Record

EXHIBIT 69

NATIONAL LABOR RELATIONS BOARD

Twelfth Region

Madison Building

Milwaukee, Wisconsin

January 27, 1940

Plankinton House Company
609 N. Plankinton Ave.,
Milwaukee, Wis.

Re: PLANKINTON HOUSE CO.
Case Nos. XII-R-215
and XII-R-216

Gentlemen:

This is to advise you that the petitions in the above matter have been, by order of the Board dismissed.

Very truly yours,

JOHN G. SHOTT (Signed)
John G. Shott
Regional Director

Respectfully submitted,

RICHARDSON, ROBERTSON, REEDER & STEARNS,

Attorneys for Respondent,
Plankinton House Company.

HERMAN M. KNOELLER
Of Counsel.

[fol. 42] Pleas before the Supreme Court of the State of Wisconsin at a term thereof begun and held at the Capitol in Madison, the seat of government of said State on the second Tuesday, to-wit: the 9th day of January, A. D. 1940,

Present: Hon. Marvin B. Rosenberry, Chief Justice, Hon. Chester A. Fowler, Hon. Oscar M. Fritz, Hon. Edward T. Fairchild, Hon. John D. Wickhem, Hon. George B. Nelson; Hon. Joseph Martin, Justices.

Arthur A. McLeod, Clerk.

Be it remembered that heretofore, to-wit: on the twenty-first day of May in the year of our Lord One Thousand Nine Hundred and Forty came into the office of the Clerk of the Supreme Court of the State of Wisconsin, the Hotel & Restaurant Employees' International Alliance, Local No. 122, Phil L. Valley, John Alexander, and Jack Heisdorf, each individually, as business agent, organizer, and Vice-President, respectively, for and as representatives of all the members of Hotel and Restaurant Employees' International Alliance, Local No. 122; International Laundry Workers, Local No. 174; Bartenders International League of America, Local No. 64, sometimes known as International [fol. 43] Bartenders & Beverage Dispensers, Local No. 64; International Union Operating Engineers, Local No. 311; Milwaukee Building Trades Council, All affiliated with the American Federation of Labor, by their attorneys and filed in said Court its certain Notice of Appeal, according to the statute in such case made and provided, and also the Return to such appeal, of the Clerk of the Circuit Court of Milwaukee County, in said State.

[fol. 44] Filed May 20, 1940, Fred J. Jaeger, Clerk.
Filed May 21, 1940, Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

STATE OF WISCONSIN, CIRCUIT COURT, MILWAUKEE COUNTY

Case No. 170-382

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, Local No. 122; Phil L. Valley, John Alexander, and Jack Heisdorf, each individually, as business agent, organizer, and Vice-President, respectively, for and as representatives of all the members of Hotel and Restaurant Employees' International Alliance, Local No. 122; International Laundry Workers, Local No. 174; Bartenders International League of America, Local No. 64, sometimes known as International Bartenders & Beverage Dispensers, Local No. 64; International Union Operating Engineers, Local No. 311; Milwaukee Building Trades Council, All affiliated with the American Federation of Labor, Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD; HENRY C. FULDNER, individually and as chairman of, L. E. Gooding, individually and as a member of, R. Floyd Green, individually and as a member of the Wisconsin Employment Relations Board and Plankinton House Company, a Corp., Respondents.

NOTICE OF APPEAL

To John E. Martin, Attorney General, Attorney for Wisconsin Employment Relations Board and the members thereof;

Richardson, Robertson, Reeder & Stearns, Attorneys for Plankinton House Company;

Fred Jaeger, Clerk of Circuit Court, Milwaukee County, Wisconsin:

You Will Please Take Notice that the petitioners above named hereby appeal to the Supreme Court of the State [fol. 45] of Wisconsin from the Judgment, Orders, and Decrees made, rendered, and entered in the above entitled action in the Circuit Court for Milwaukee County, Wiscon-

sin, on May 14, 1940, and from the whole and every part thereof.

You Will Take Further Notice that the petitioners further appeal from the order made and entered on May 17, 1940, by the Circuit Court for Milwaukee County, Wisconsin, limiting petitioners' conduct in the premises, and denying a stay of the court's judgment, orders, and decrees, and from the whole thereof.

Dated this 18th day of May, 1940.

Padway, Goldberg & Tarrell, Attorneys for Petitioners.

Statement As To No Necessity for Undertaking

Padway, Goldberg & Tarrel, attorneys for the above named petitioners, respectfully show to the court that the appeal in the above entitled matters is taken by virtue of Section 111.07(7), and in the manner therein provided by Section 102.25 of the Wisconsin Statutes, 1939, which obviates the requirement of the execution, service, or filing of any undertaking required by Section 274.11 (3), Wisconsin Statutes, 1939, in order to perfect such appeal.

Dated at Milwaukee, Wisconsin, May 18, 1940.

Padway, Goldberg & Tarrell, Attorneys for Petitioners.

[fol. 46] Western Union

(54)

1940 May 20 PM 3 59

Filed May 20, 1940. Fred J. Jaeger, Clerk.
Filed May 21, 1940. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

AUC162 38 DL—Madison Wis 20 3[illegible] P

Padway Goldberg & Tarrell
212 West Wisconsin Ave.

Service of Notice of Appeal in Case No. 170-382, Circuit Court Milwaukee County, entitled Hotel and Restaurant Employees, etcs., et al. v. Wisconsin Employment Relations

Board, et al. (Plankinton Case) admitted this twentieth dad of May, 1940.

John E. Martin, Attorney General,

170-382 etcs. et al. v. et al., 1940.

[fol. 47] (Endorsements)

170382

State of Wisconsin, Milwaukee County Circuit Court

Hotel & Restaup'nt Employees, et al., etc., Plaintiff

vs.

Wisconsin Employment Relations Board, et al., Defendant

#170-382

Notice of Appeal and Statement

Paid $12.00 appeal fee into court, 5/20/1940.

Copy received this 20th day of May 1940. Richardson, Robertson, Reeder & Stearns, Attorneys for Plankinton House Co.

Service admitted this 20th day of May 1940. Fred J. Jaeger, Clerk of Circuit Court, Milwaukee County, Wis.

Padway, Goldberg & Tarrell, Attorney- for Petitioners, 511 Warner Theatre Bldg., Milwaukee, Wis.

Filed May 20 1940. Fred J. Jaeger, Clerk.

Filed May 21 1940. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

[fol. 48] And afterwards, to-wit: on the 12th day of September, A. D. 1940, the same being the 4th day of said term, the following proceedings were had in said cause in this Court:

MILWAUKEE CIRCUIT COURT

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL NO. 122, ET AL., Appellants

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL., Respondents

And now at this day came the parties herein, by their attorneys, and the argument of this cause having been commenced by I. E. Goldberg, Esq., and David Previant, Esq., for the said appellants, and by Newell S. Boardman, Esq., Assistant Attorney General, for the said respondent Board, and by Herman M. Knoeller, Esq., for the said respondent, Plankinton House Company, and there not being now sufficient time to complete the same, it is hereby continued for further argument.

[fol. 49] And afterwards, towit: on the 13th day of September A. D. 1940, the same being the 6th day of said term, the following proceedings were had in said cause in this Court:

MILWAUKEE CIRCUIT COURT

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL NO. 122, ET AL.; Appellants

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL., Respondents

And now at this day came the parties herein, by their attorneys, and the argument of this cause having been resumed and completed, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

[fol. 50] And afterwards, to-wit: on the 8th day of November, A. D. 1940, the same being the 19th day of said term, the judgment of this court was rendered in words and figures following, that is to say:

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, Local No. 122, Phil L. Valley, John Alexander, and Jack Heisdorf, each indiyidually, as business agent, organizer, and Vice-President, respectively, for and as representatives of all the members of Hotel and Restaurant Employees' International Alliance, Local No. 122; International Laundry Workers, Local No. 174; Bartenders International League of America, Local No. 64, sometimes known as International Bartenders & Beverage Dispensers, Local No. 64; International Union Operating Engineers, Local No. 311; Milwaukee Building Trades Council, All affiliated with the American Federation of Labor, Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD; HENRY C. FULDNER, Individually and as chairman of, L. E. Gooding, individually and as a member of, R. Floyd Green, Individually and as a member of the Wisconsin Employment Relations Board and Plankinton House Company, a Corporation, Respondents.

Milwaukee Circuit Court. Opinion by Chief Justice Rosenberry

This cause came on to be heard on appeal from the judgment of the Circuit Court of Milwaukee County, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Milwaukee County, in this cause, be, and the same is hereby, affirmed, with costs against the said appellants taxed at the sum of Two Hundred Seventy-seven and no/100 ($277.00) Dollars.

[fol. 51] Thereupon the opinion of the Court by Chief Justice Rosenberry was filed in words and figures following, that is to say:

[fol. 52] STATE OF WISCONSIN: IN SUPREME COURT

August Term, 1940. No. 68

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL No. 122, ET AL., Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL., Respondents.

APPEAL from a judgment of the circuit court for Milwaukee county. GUSTAVE G. GEHRZ, Circuit Judge. Affirmed.

This action was begun on February 24, 1940, by Hotel & Restaurant Employees' International Alliance, Local No. 122, Phil L. Valley, John Alexander and Jack Heisdorf, each individually, as business agent, organizer, and vice-president, respectively, for and as representatives of all the members of Hotel & Restaurant Employees' International Alliance, Local No. 122; International Laundry Workers, Local No. 174; Bartenders International League of America, Local No. 64; International Union Operating Engineers, Local No. 311; Milwaukee Building Trades Council, all affiliated with the American Federation of Labor, petitioners, against Wisconsin Employment Relations Board, Henry C. Fuldner, individually and as chairman of, L. E. Gooding, individually and as a member of, R. Floyd Green, [fol. 53] individually and as a member of the Wisconsin Employment Relations Board, and Plankinton House Company, a corporation, defendants, to review the findings, orders and decisions made by the Wisconsin Employment Relations Board in the proceeding before that board, entitled Plankinton House Company, a Wisconsin corporation, complainant, vs. Hotel & Restaurant Employees' International Alliance, Local No. 122, et al., respondents, the findings having been made by the Wisconsin Employment Relations Board, hereafter referred to as the board, on February 15, 1940. The matter was heard by the court and on May 14, 1940, the court ordered and adjudged that the findings and conclusions of the board complained of be in all respects sustained, confirmed and enforced. From this judgment the petitioners appeal.

Inasmuch as only questions of law are raised upon this appeal we shall state only so much of the facts as are material to an understanding of these questions. The petitioners are certain labor unions described above together with individuals, personally and as agents and officers of said unions. The defendants are the Wisconsin Employment Relations Board and the Plankinton House Company. On the 16th day of June, 1938, the Plankinton House Company entered into a collective bargaining contract with the unions, which contract covered wages, hours and working conditions governing employees of the Plankinton House Company employed at the Plankinton House and the Kilbourn Hotel, and provided as a condition of such employment that all employees coming within the terms of said contract must be and remain members of one of the respective unions so long as employed by the Plankinton House Company.

[fol. 54] It was further provided that said contract was to continue for one year ending on the 15th day of June, 1939, and for consecutive one year renewals unless either party served notice in writing on the other party at least thirty days before the expiration of such year that such party desired to terminate the contract at the end of the contract year. There was also a provision for notice of continuance and a provision for subsequent negotiations. The unions served notice of continuance on May 15, 1939, but desired to negotiate for improved hours, wages and working conditions. The Plankinton House Company served notice that it desired to continue the contract for another year and desired to negotiate. Negotiations between the parties failed, arbitration was had in accordance with the terms of the contract and on October 30, 1939, the Plankinton House Company gave notice of its willingness to execute a contract in accordance with the terms of the arbitration award. On November 2, 1939, in the afternoon, the employees of the Company at both the Plankinton House and Kilbourn Hotel went on strike. Prior to calling such strike the employees did not vote by secret ballot to call such strike. Immediately after the strike was called, picketing was engaged in at the three entrances to the Plankinton House. Picketing was carried on by the members of all of the unions involved and pickets carried banners bearing the names of all petitioning unions. The business manager of the Hotel & Restaurant Employees International Alliance, Local No. 122, notified

Marquette University and the Milwaukee School of Engineering that all students working at the Plankinton House for their meals immediately discontinue such work and that unless such students did discontinue such work the union [fol. 55] would be forced to stop the employment of such students working at other hotels and restaurants in the city of Milwaukee which had collective bargaining contracts with Local No. 122; that ever since the strike the Plankinton House and the Kilbourn Hotel have continued to operate with new employees replacing the striking employees.

On November 4, 1939, union pickets by means of force prevented the delivery of floral decorations to the Plankinton House; that as a result of the altercation, Jack Heisdorf, vice-president of Local No. 122, and Charles McLaughlin, assistant to the secretary of Local No. 122, were arrested, convicted and paid fines. Charles McLaughlin returned to the picket line immediately after his arrest and on November 17, 1939, assaulted one Lester Raasch, an employe of the Plankinton House and was again arrested, convicted and fined. Other fines were paid under similar circumstances by other striking employees and by pickets employed by the union. Convictions were had therefor.

Upon the basis of its findings of fact, the Board found as conclusions of law and made the following order:

"1. That the contractual relationship existing between the Plankinton House Company and the respondent unions was terminated by the respondent unions on the 2nd day of November, 1939, by the refusal of said unions to accept the award of the board of arbitration, and their act of calling a strike at the Plankinton House and the Kilbourn Hotel.

"2. That the respondent unions are guilty of unfair labor practices by cooperating and engaging in promoting and inducing picketing and boycotting, all being overt concomitants of a strike, without first obtaining the approval of the majority of the employees of the Plankinton House Company by a secret ballot.

"3. That all of the former employes of the Plankinton House Company who went out on strike and who remained out on strike, have been parties to an unfair labor practice by cooperating and engaging in a strike without first obtaining the approval of a majority of such employes.

[fol. 56] "4. That the following named persons, by reason of threats and assaults made by them to and on employes of the Plankinton House or persons seeking to do business with the Plankinton House, or by misdemeanors committed by them arising out of the controversy between the respondent unions and the complainant, Plankinton House Company, are guilty of unfair labor practices. Phil L. Valley, Jack Heisdorf, Charles McLaughlin, Charles Alden, James C. O'Brien, John Thomas O'Maher, Joseph Hofich and Thomas James.

"Upon the basis of the foregoing findings of fact and conclusions of law the Board, pursuant to section 111.07 (4) of the Wisconsin Statutes, makes the following

Order

"It is ordered that the respondent unions, Hotel and Restaurant Employees International Alliance, Local No. 122, International Laundry Workers, Local No. 174, Bartenders International League of America, Local No. 64, International Union of Operating Engineers, Local No. 311, and the Milwaukee Building Trades Council, the officers, members, agents, successors and assigns of each shall:

"1. Immediately cease and desist from:

(a) Engaging in promoting or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;

(b) Attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of the Plankinton House Company;

(c) Boycotting in any way the Plankinton House Company.

"2. Take the following affirmative action, which the Board finds will effectuate the policies of the act:

(a) Post notices to their members in conspicuous places at the union headquarters that the union has ceased and desisted in the manner aforesaid, and that all officers, members and agents of the union are to refrain from engaging in promoting or inducing picketing and boycotting of the Plankinton House Company, and also to refrain from attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of the Plankinton House Company.

(b) Notify the Board in writing forthwith that steps have been taken by each of the respondent unions to comply herewith."

With its answer to the petition to set aside and vacate the order the Board filed a petition and cross-complaint asking that the court enter an order confirming and enforcing all of the provisions of its order as amended. The petition and cross-complaint having been brought on for hearing, the court by its judgment sustained the findings of the Board and a judgment was entered accordingly sustaining, confirming and enforcing the order.

[fol. 57] ROSENBERRY, C. J. By ch. 57 of the Laws of 1939, the legislature repealed ch. 111 of the statutes of 1937 and created a new chapter to be designated ch. 111. We shall state only so much of this chapter as is necessary to present the questions to be considered. The chapter provides that it may be cited as the employment peace act.

Sec. 111.01 Stats. 1939, declares the public policy of the state as to employment relations and collective bargaining. It recognizes that there are three major interests involved, namely, that of the public, the employe and the employer.

Sec. 111.02 Stats. 1939, defines certain terms used in the chapter.

. . . . . .

"(5) 'Collective bargaining' is the negotiating by an employer and a majority of his employes in a collective bargaining unit (or their representatives) concerning representation or terms and conditions of employment of such employes in a mutually genuine effort to reach an agreement with reference to the subject under negotiation.

"(6) The term 'collective bargaining unit' shall mean all of the employes of one employer (employed within the state), except that where a majority of such employes engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in section 111.05 (2) to constitute such group a separate bargaining unit they shall be so considered. Two or more collective bargaining units may bargain collectively through the same representative where a majority of the employes in each separate unit shall have voted by secret ballot as provided in section 111.05 (2) so to do."

. . . . . .

"(8) The term 'labor dispute' means any controversy between an employer and the majority of his employes in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute."

Sec. 111.06, Stats. 1939, defines what are unfair labor practices:

(1) (Not involved here.)

"(2) It shall be an unfair labor practice for an employe individually or in concert with others: * * *

(e) To cooperate in engaging in, promoting or inducing picketing, boycotting or any other overt act concomitant of a strike unless a majority in a collective bargaining unit of the employes of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike."

* * * * * * *

[fol. 58] "(3) It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employes, or in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by subsections (1) and (2) of this section."

While the briefs on both sides contain much matter relating to the history, background and philosophy of labor legislation, the *sole* contention made here is that subsec. (2) (e) 111.06 Stats. 1939 is unconstitutional and void (1) because it contravenes the guaranties of free speech afforded by the Fourteenth Amendment to the Constitution of the United States and Section 3 of Article I of the Constitution of the State of Wisconsin; (2) because it does not constitute a valid exercise of the police power of the state since it is for the vindication of a private right and not a public right; (3) because it is indefinite and uncertain because it establishes no means or standards wherein and whereby the requisite balloting can be conducted and the results thereof ascertained and is therefore incapable of application; and (4) because the terms "picketing", and "boycotting", are vague and indefinite; their use in

the statute and order is not sufficient to apprize the unions as to what conduct is or is not prohibited.

In order to determine whether the employment peace act is unconstitutional, it must first be construed. Petitioners argue that under the provisions of subsec. (2) (e) of the act sec. 111.06, Stats. 1939, and the order issued by the board pursuant thereto that individual employees are forbidden as individuals to do any of the things enumerated in the subsection except in support of an authorized strike. The legislature has very carefully and explicitly set out as an aid in the construction of the act what it intended to do in its declaration of policy. In addition to that sec. 111.15, Stats. 1939, provides:

[fol. 59] "Except as specifically provided in this chapter, nothing therein shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work; nor shall anything in this chapter be so construed as to invade unlawfully the right to freedom of speech. And nothing in this chapter shall be so construed or applied as to deprive any employe of any unemployment benefit which he might otherwise be entitled to receive under chapter 108 of the statutes (unemployment benefits)."

The legislature also amended ch. 103, Stats., entitled Employment Regulations, but did not amend or repeal sec. 103.53, Stats., which makes lawful the doing of certain things in labor disputes. It also redefined the term "Labor dispute" as found in ch. 103, as follows:

"103.62 (3) The term 'labor dispute' means any controversy between an employer and the majority of his employes in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute. The provisions of this subsection shall supersede any provision of the statutes in conflict therewith."

The act also established rules for determining when a case shall be held to involve or grow out of a labor dispute. The definition of 'labor dispute' and the rules for determining when a case shall be held to involve or grow out

of a labor dispute contained in ch. 57 of the Laws of 1939 are widely different in theory and purpose from like provisions to be found in the statutes of 1937, which they supplanted. Chapter 57 limits a labor dispute to a case where there is a controversy between an employer and a majority of his employes in a collective bargaining unit. The definition contained in sec. 103.62 (3), stats. 1937, was very much broader and much more inclusive than that contained in sec. 103.62 (3), stats. 1939.

Upon the oral argument great stress was laid upon the fact that according to the terms of the act an employe was deprived of his constitutional right of freedom of speech. Appellants support their contention in this regard by [fol. 60] reference to the case of Thornhill v. Alabama (1940), 310 U. S. 88, 60 Sup. Ct. 736, 84 L. ed. 1093. Counsel, however, ignore the fact that the Thornhill case dealt with a statute which prohibited loitering or picketing and declared picketing to be a misdemeanor. As construed by the state court it prohibited the publicizing of the facts of a labor dispute whether by printed sign, by pamphlet, by word of mouth or otherwise. The peace act deals with concert of action in carrying on an unauthorized strike by the usual overt acts concomitant of a strike.

The peace act, however, does not forbid picketing. It attempts to regulate it and to provide under what conditions and circumstances picketing may be carried on by striking employees. The peace act expressly provides that it shall not be so construed as to impair the right of free speech. One violating the provisions of the peace act is not guilty of a misdemeanor. His act is merely declared to be an unfair labor practice. The right to speak freely is guaranteed by the constitution but that right the same as other rights guaranteed by the constitution is subject to limitations. In the exercise of that right one is not free from liability for libel, duress, fraud, although speech was the agency in each case. John F. Jelke Co. v. Beck (1932), 208 Wis. 650, 242 N. W. 576, Wisconsin Labor Relations Bd. v. Fred Ruepling Leather Co. (1938), 228 Wis. 473, 279 N. W. 673. See also Schenck v. United States (1919), 249 U. S. 47, 39 Sup. Ct. 247, 63 L. ed. 470, Gitlow v. New York (1925), 268 U. S. 652, 45 Sup. Ct. 625, 69 L. ed. 1138.

The act does not limit the right of an employe to speak freely. It declares cooperating "engaging in, promoting

or inducing picketing, boycotting" etc. in aid of an unauthorized strike, to be an unfair labor practice. The fact that an employe in the course of doing the designated acts [fol. 61] may use speech as a means of carrying on his activities, does not bring the acts within the protection of the constitutional guaranties of free speech. The term "picketing" as used in subsec. (2) (e), Sec. 111.06, stats. 1939, does not include acts held in the Thornhill case supra to be within the protection of the constitutional guaranty of the right of free speech. The express language of the act forbids such a construction. It clearly refers to that kind of picketing which the Thornhill case says the state has power to deal with "as a part of its power to preserve the peace, and protect the privacy, the lives and the property of its residents".

Par. (e) by its terms does not apply to an individual. An individual cannot cooperate with himself. Par. (e) does not forbid an employe to quit his employment individually or in concert with others. It does not forbid an employe singly or in concert with others from bringing about a vote by a collective bargaining unit as to whether there shall be a strike. By the act strikes are divided into two classes,—authorized and unauthorized. Par. (e) has no application except in the case of an unauthorized strike. It is the act of cooperating in engaging in, promoting or inducing picketing, boycotting or other overt acts in support of an unauthorized strike that par. (e) declares to be an unfair labor practice. Nowhere in the act is it declared that engaging in, promoting or inducing picketing, boycotting or any other act concomitant of a strike shall be deemed to be an unlawful act. It is declared merely to be an unfair labor practice. Our attention has been called to a decision of the Supreme Court of the State of Oregon, American Federation of Labor, Plaintiff v. James R. Bain et al., Defendants, (Or.), 106 Pac. (2nd) 544, decided October 22, 1940. The statute under consideration in that case was widely different from ch. 111, stats. 1939. In construing this statute, the Supreme Court of Oregon said: (106 Pac. (2nd) 544, 554) [fol. 62] "In the statute there is no definition of the word 'picket'. It is a word of 'vague contours,' as the Supreme Court said in the Thornhill case, and doubtless may be used to indicate conduct of a noxious character with which the state has power to deal. But it also embraces activities

which the Supreme Court holds the state may not lawfully suppress. It includes, we think, the conduct of one who walks or patrols in the vicinity of a place of business, involved in a labor dispute, and by word of mouth, banner or placard, undertakes to give information to the public concerning such dispute. The conduct of such person may be peaceful or otherwise; his demeanor orderly or threatening; the information true or false. The activity may be, and usually is, incident to an organized effort to prevail in the controversy, and we concur in the view of counsel for the defendants that it was precisely picketing by a member of a labor union and on behalf of his organization that the voters had in mind when they enacted this law. But that the activities embraced by the word 'picket' were intended to include such as are free from violence, intimidation and fraud,—what is ordinarily called 'peaceable picketing'—we think there can be no doubt. It follows that the very type of conduct which the Supreme Court held in the Thornhill and Carlson cases to be protected by the Fourteenth Amendment, is denounced by the Oregon statute unless engaged in incident to a controversy relative to wages, hours or working conditions, between an employer and a majority of his employees."

As already pointed out the Wisconsin statute expressly provides that it shall be so construed and applied that it shall not interfere with the right of free speech. As we understand and construe the statute the right of free speech is not interfered with. The conduct complained of in this case and described as "picketing" was not the sort of conduct that was indulged in by the defendant in the Thornhill case supra. The conduct complained of in this case and dealt with by the board and by the court was of an entirely different character. It was mass picketing, organized and carried on by the unions supplemented by boycott and violence and was clearly within the exception stated in the Thornhill case warranting state action. In that case, the Supreme Court of the United States said: (p. 105)

"We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger."

[fol. 63] Chapter 111, Stats. 1939 is a statute of that character. We do not understand the decisions of the United States Supreme Court to mean that there can be no regulation of the right of picketing. That Court has not yet said that a person who goes upon the premises of another for the purpose of creating a disturbance and disorganizing the other's business, is protected in the doing of such acts by the constitutional guaranty of free speech. In this case it is undisputed that numerous assaults were committed by pickets, that the pickets acted in concert; that the fines of these pickets were paid by the unions; that ingress and egress to and from the premises of the employer were prevented by force and arms. It was at conduct of that kind that the statute was aimed. It is conduct of that kind that is dealt with in this case. It is conduct of that kind that is declared to be an unfair labor practice by the statute and from which the defendants are ordered to cease and desist. The statute does not even declare conduct of that kind to be unlawful, nor does it subject the offender to a criminal prosecution. In this respect it differs fundamentally from the statute that the Oregon Supreme Court had under consideration.

The effect of pursuing a course of conduct which under the statute amounts to an unfair labor practice is:

(1) to subject the actor to the provisions of sec. 111.07, stats. 1939. Under it he may upon complaint be brought before the Board where he may answer the complaint and appear in person or otherwise at the hearing, of which a full and complete record is required to be kept. After the final hearing the board is required promptly to make [fol. 64] and file its findings. The board may by its final order dismiss the charges or require the person complained of to cease and desist from the unfair labor practice found to have been committed, suspend his rights of immunities, privileges or remedies granted or afforded by the chapter for not more than a year and require him to take such affirmative action, including reinstatement of employees with or without pay, as the board may deem proper. The determination of the board may be enforced by the judgment of the circuit court.

(2) When a person is found guilty of an unfair labor practice he loses the benefit of sec. 103.53 Stats. 1939 which prescribes what acts whether performed singly or in con-

cert shall be legal in the conduct of a labor dispute. He is thereby remitted to his rights under the constitution, other statutes and the common law. This is recognized in sec. 111.07 (1), which provides in part:

"Nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction."

This exception of course applies to the employe, employer or any person connected with a particular controversy as described in sec. 111.06 (3) Stats. 1939.

"An employee who is guilty of an unfair labor practice may lose his status as an 'employee' as defined in sec. 111.02 (3)." Stats. 1939.

No rights of a person guilty of an unfair labor practice are invaded until there has been a final determination by the board. The statute is not self-executing. It merely provides the machinery by which certain described labor practices may after due hearing, be held to be unfair and the person complained of ordered to cease and desist there-[fol. 65] from. Nothing in the act prevents or was intended to prevent employees from making such demands upon their employer as they think the circumstances warrant. Whether such employees act singly or in concert they are within their rights in making such demands upon their employer. We find nothing in the act which prevents a minority of a collective bargaining unit from withdrawing from employment either singly or in concert. They are not guilty of an unfair labor practice in so doing. But if they attempt to coerce their employer by concerted picketing, a boycott or by any other similar overt act concomitant of a strike, they will be guilty of an unfair labor practice as defined in the act. We say similar overt act because the maxim of ejur dem generis applies. C. & N. W. Ry. Co. v. Railroad Comm. (1916), 162 Wis. 91, 155 N. W. 941.

The petitioners complain that the characterization of the acts of employees as unfair labor practices cannot be made to depend on the action of a majority of a collective bargaining unit; that the legislature cannot place it within the power of a majority of the collective bargaining unit to authorize a strike. This argument is an attack upon a principle which is fundamental in the attempt of the legislature and of congress to regulate labor relations. The

principle upon which authorized collective bargaining depends is that the rule of the majority within an appropriate collective bargaining unit shall bind the minority. We see no way by which the principle of collective bargaining can be maintained unless this right of a majority of a collective bargaining unit to speak for the unit including the minority is maintained. A bargain on behalf of a collective bargaining unit amounts to nothing if after it is made, the individuals or some of them comprising that unit are not affected thereby. This principle is explicit in the Na- [fol. 66] tional Labor Relations Act, in the Railway Labor Peace Act, and in the act now under consideration. If the majority of a collective bargaining unit can thus coerce the minority in the matter of bargaining, we see no reason why the legislature may not vest in a majority of the unit power to determine whether such conditions obtain in the employment as warrant the calling of a strike in an effort to remedy them. There is no more delegation of legislative power in the one case than there is in the other. It is in most cases the same majority that made the bargain for the unit that determines whether a strike shall be called. We see in this no delegation of legislative power. Whether the conditions are such in the employment as justify the employees in striking is a matter more particularly within the knowledge of the employees than anyone else and is in the last analysis merely a question of fact. A vote of the majority of the employees in a collective bargaining unit to strike is a determination that facts exist which justify it. When such determination is made, subsec. (2) (e) Sec. 111.06, Stats. 1939, does not apply. The method of determining when a strike is justifiable is almost identical with the method provided for the submission to a municipality of whether a particular law shall be effective within that municipality. The electors determine upon the basis of their own knowledge whether conditions are such as to make the operation of the law within the municipality desirable and conducive to the general welfare. That also is a question of fact. When a majority have voted to call a strike, the means and methods of coercion which they may employ are not unlimited or unrestricted. Less than a majority may strike but they will be under the restrictions of [fol. 67] the statutes as to the methods of coercion which they may use. Sec. 103.53 specifies with particularity what

may be considered legal in the conduct of a labor dispute. These enumerated means striking employees not guilty of an unfair labor practice are at liberty to employ. Any court or judge is forbidden to restrain the doing of such acts when done in connection with a labor dispute. The sole difference between coercive acts in support of a strike which has been called by a majority of members of a collective bargaining unit and one which has not been so called is that the members of a minority group do not have the benefit of sec. 103.53, that is, by indulging in an unauthorized strike they lose their privileges under that section and are subject to the provisions of ch. 111 Stats. 1939, relating to unfair labor practices. The character of their coercive acts must then be determined either by submitting the controversy to the board or by "the pursuit of legal or equitable remedies in courts of competent jurisdiction". If one merely withdraws from his employment he is not subject to the act.

On behalf of the appellants fear is expressed that a "servile, docile or moribund majority refuses to place its stamp of approval, to grant a license, to the carrying on of peaceful, truthful appeals to the public".

This argument seems to disregard the fact that the question of whether intolerable working conditions, oppressive wages or killing hours need correction is submitted to a majority of the group which must be suffering under these same conditions, the majority cannot by their action impose anything upon a minority that they do not by the same action impose upon themselves.

[fol. 68] There is nothing in the history of the labor movement to warrant any fear that labor will be servile, docile or moribund. On the contrary, no group within the body politic has shown itself more willing to stand upon its rights and sacrifice present advantage for future benefits than has labor.

The petitioners further contend that the cease and desist order is too broad; that even though the petitioners have been found guilty of unlawful labor practices in the conduct of their unauthorized strike, that all picketing and boycotting cannot be forbidden by the board and cite as authority for their contention, May's Furs and Ready to Wear, Inc., v. Bauer (1940), 282 N. Y. 331, 26 N. E. 2d 279. The proceeding in the May's v. Bauer case was one for

injunctive relief. This contention is based on the assumption that the rules which apply to a court in granting injunctive relief apply in the hearing before the board. In May's Furs and Ready To Wear case, the employer sought an injunction in a court of equity. The court said: p. 337.

"Upon this appeal there is involved the scope and application of a legislative enactment whose wisdom or lack of wisdom is not a consideration open to judicial inquiry. Subject only to constitutional restrictions, it is the duty of this court to apply the statute as enacted by the Legislature."

The question decided was that the statutes of the state of New York providing that the court should not issue injunctions in a case growing out of a labor dispute except in accordance with the provisions of the statute were controlling; that under the statute the court could not enjoin lawful acts committed in support of a strike. We have a similar statute in Wisconsin (Sec. 103.56) but by sec. 111.17, Stats. 1939, it is provided that the provisions of ch. 111 Stats. 1939 shall prevail wherever they conflict with the provisions of other statutes. This Court is under the [fol. 69] same duty to declare the law in accordance with the provisions of ch. 111 that the court of the state of New York was under to declare the law in respect to injunctions in labor disputes and for the same reasons.

It is argued that the terms "picketing" and "boycotting" are so vague, indefinite and uncertain as to render subsec. (2) (e) Sec. 111.06 Stats. 1939 void. In support of that argument cases relating to the construction of statutes defining criminal offenses are cited. Chapter 111 Stats. 1939 creates no criminal offenses. Violation of any of its terms does not subject the actor to criminal prosecution. The board is charged with the duty of enforcing the act. The power of the board relating to enforcement does not arise until some party in interest has filed a complaint in writing.

There can be no question but that the purpose of the legislature in enacting ch. 111 Stats. 1939 was widely different from the purpose which actuated it in the enactment of ch. 111, Stats. 1937, which was repealed. It appears from the briefs that much complaint was made because ch. 111, stats. 1937, made no provision with respect to unfair labor practices by employees. In providing for "indus-

trial peace, regular and adequate income for employees and the uninterrupted production of goods and services", [Sec. 111.01 (2) Stats. 1939] we see no reason why the legislature may not forbid concerted picketing and boycotting in aid of an unauthorized strike. Under Sec. 103.51, etc., stats. 1937, it was held that the plant of an employer might be picketed although there was no dispute between him and his employees and the employer employed no members of the union. American Furn. Co. v. I. B. of T. C. & H. of A. (1936), 222 Wis. 338, 268 N. W. 250. Under the [fol. 70] same statute it was held that a labor union might conduct picketing operations for the purpose of coercing an employer to desist from performing work in his own business and in connection with projects undertaken by him. Senn v. Tile Layers Protective Union (1936), 222 Wis. 383, 268 N. W. 270, 268 N. W. 872. It is apparent that the legislature was of the view that too wide a latitude was given to employees in their attempts to coerce their employers. All these questions relating to rights of employees to organize, conduct strikes, boycotts and other coercive measures are in the field of public policy. As the Court of Appeals of New York said in the case already cited and as this Court has said many, many times these questions are for the legislature. Courts do not sit to pass upon the wisdom or unwisdom of the acts of the legislature. In order to preserve order and prevent breaches of the peace and assure to all citizens their lawful rights, the legislature may well forbid the doing of acts which under other circumstances would be lawful. The acts committed by the petitioners as shown by the findings in this case would have justified injunctive relief under the common law or any labor relations statute, either state of federal.

While in the absence of legislation it was necessary for the Court to declare public policy in controversies relating to labor relations, when the legislature acts within the constitutional limits of its power, its mandates supersede court decisions and control as to future controversies. Both parties to a labor dispute are under the same constitution and both are subject to the valid acts of the legislature. Just where the line should be drawn in an effort to balance the bargaining power of the parties is primarily a matter of public policy for the legislature and not a question of law for the courts.

[fol. 71] We discover no invasion of the right of freedom of speech either in subsec. (2) (e), Sec. 11.06, Stats. 1939, or in the way the law was administered by the board in this case. The right of the individual to freedom of speech is by the terms of the act left unimpaired. It is the right to concert of action that is regulated. Nor do we discover any such uncertainty or indefiniteness in the law as to render it invalid. While it is true that the terms "picketing" and "boycotting" are not terms of definite legal content, they are descriptive of a process well known to the law and when considered in connection with the other provisions of ch. 111 and ch. 103, Stats. 1939, the meaning of these terms becomes reasonably certain.

The statute is one providing for the regulation and protection of civil rights and therefore does not partake of the nature of a criminal statute. By engaging in an unauthorized strike an employe loses his status as an employe. He then has the same rights and is subject to the same liabilities as a third person. When he thus withdraws from his employment he is free to speak but his right to coerce his former employer is limited by the act. Except as his acts affect the employer he is under no restraint. It is true that the act limits the use of coercive measures as they have ordinarily been used in labor disputes but that is a matter for the legislature. It is not within the province of the court to pass upon the wisdom or unwisdom of the public policy declared by the legislature.

Since we interpret the order of the board to be co-extensive with the statute as construed, we find it unnecessary to modify the order or judgment.

By the Court: Judgment affirmed.

[fol. 72] And afterwards, to-wit: on the 25th day of November, A. D. 1940, the following motion for rehearing was filed by Appellant, in words and figures following, that is to say:

[fol. 73] STATE OF WISCONSIN IN SUPREME COURT, AUGUST TERM, 1940

No. 68

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL No. 122; Phil L. Valley, John Alexander, and Jack Heisdorf, each individually, as Business Agent, Organizer, and Vice-President, Respectively, for, and as representatives of all the Members of Hotel and Restaurant Employees' International Alliance, Local No. 122;

INTERNATIONAL LAUNDRY WORKERS, LOCAL No. 174;

BARTENDERS INTERNATIONAL LEAGUE OF AMERICA, LOCAL No. 64, sometimes known as International Bartenders & Beverage Dispensers, Local No. 64;

INTERNATIONAL UNION OPERATING ENGINEERS, LOCAL No. 311;

MILWAUKEE BUILDING TRADES COUNCIL,

All Affiliated with the American Federation of Labor, Petioners and Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD: Henry C. Fuldner, individually and as Chairman of, L. E. Gooding, individually and as a member of, R. Floyd Green, individually and as a member of the Wisconsin Employment Relations Board; Plankinton House Company, Respondents.

MOTION FOR REHEARING

Now come the appellants above named by Padw..y, Goldberg & Tarrell, their attorneys, and respectfully move the Court for a rehearing in the above entitled matter for the following reasons, to-wit:

[fol. 74] 1. The Court did not give full weight and effect to the decisions of the United States Supreme Court in the cases of Thornhill v. Alabama, 84 L. Ed. (Adv. Op.) 659, and Carlson v. California, 84 L. Ed. (Adv. Op.) 668.

2. The Court erred in concluding that the Constitution of the State of Wisconsin and the Constitution of the United States does not apply with equal force and effect to peaceful concerted exercises of the rights therein enumerated as well as to peaceful individual exercises of such rights.

3. The Court erred in failing to modify the judgment of the Circuit Court and the Wisconsin Employment Relations Board so as to permit the peaceful and lawful activities assured to the appellants and each of them under the Constitution of the State of Wisconsin and the Constitution of the United States.

4. The Court erred in holding that the right to peacefully picket, patrol, advertise and to engage in the right of free speech can be made to depend upon a license granted by a majority of employees in a designated unit.

5. The Court erred in holding that the provisions of Section 111.06 (2) (c) constituted a regulation of the exercise of the rights guaranteed by the Constitution of the State of Wisconsin and the Constitution of the United States rather than an absolute prohibition thereof to a minority.

6. The Court erred in holding that the legislature may validly outlaw certain types of strikes and call such strikes "unauthorized strikes" and thus prohibit the right to strike to minority groups in the State of Wisconsin.

[fol. 75] 7. The Court erred in holding conduct to be coercive which has been declared by the Supreme Court of the United States to be the exercise of the right of free speech and assemblage guaranteed by the Fourteenth Amendment to the Constitution of the United States.

8. Section 111.06 (2) (c) Wis. Stats. 1939 as construed by this Court and the order of the Wisconsin Employment Relations Board based thereon are in violation of the First Amendment to the Constitution of the State of Wisconsin and the Fourteenth Amendment to the Constitution of the United States in that the appellants herein and all others similarly situated have been denied the equal protection of the laws and have been deprived of their liberty and property without due process of law.

9. The decision of the Court deprives these petitioners and each of them of the rights, privileges and immunities

assured to them by the Constitution of the State of Wisconsin and the Constitution of the United States.

10. The decision of the Court requires clarification and correction in certain important aspects, so that the rights and duties of these appellants and all others who may be similarly situated can be more precisely ascertained.

11. The Court erred in holding that vesting the fact finding power in nonofficial, miscellaneous and indefinite groups does not constitute an unlawful delegation of legislative powers contrary to the Constitution of the State of Wisconsin.

[fol. 76] And for such other reasons and on such other grounds as will be set forth in the printed argument hereafter to be filed for the appellants in support hereof.

Padway, Goldberg & Tarrell, Attorneys for Petitioners and Appellants.

Dated November 23, 1940.

[fol. 77] Endorsements: State of Wisconsin, Milwaukee County, Supreme Court, August Term, 1940. No. 68.

Hotel & Restaurant Employees' International Alliance No. 122, Petitioners and Appellants,

vs.

Wisconsin Employment Relations Board et al., Respondents.

Motion for Rehearing

Service of a copy of the within admitted this 23rd day of November 1940. Herman Knoeller, Attorney. Miss Mac Niven.

Padway, Goldberg & Tarrell, Attorneys for Petitioners and Appellants, 511 Warner Theatre Bldg., Milwaukee, Wis.

Filed November 25, 1940. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

[fol. 78] And afterwards, to-wit, on the 25th day of November, A. D. 1940, an order was entered in this court re-

taining the record in this cause until the final determination of same, in words and figures following, that is to say:

MILWAUKEE CIRCUIT COURT

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL NO. 122, ET AL., Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL., Respondents.

The said appellants having moved for a rehearing in this cause, it is now here ordered that the record be retained in this Court until the final determination of said motion.

[fol. 79] And afterwards, to-wit: on the 7th day of January, A. D. 1941, the same being the 1st day of said term, the motion was denied in words and figures following, that is to say:

MILWAUKEE CIRCUIT COURT

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL NO. 122, ET AL., Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL., Respondents.

The Court being now sufficiently advised of and concerning the motion of the said appellants for a rehearing in this cause, it is now here ordered and adjudged by this Court that said motion be and the same is hereby, denied, with $25.00 costs and costs of motion.

[fol. 80] Thereupon the opinion of the Court on motion for rehearing was filed in words and figures following, that is to say:

[fol. 81] Filed Jan. 7, 1941. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

In Supreme Court, State of Wisconsin

No. 68

August Cal., 1940; January Term, 1941

Hotel & Restaurant Employees' International Alliance, Local No. 122, et al., Appellants,

vs.

Wisconsin Employment Relations Board, et al., Respondents.

On Motion for Rehearing

Rosenberry, C. J. On motion for rehearing. On this motion appellants open their argument with the following statement:

"Since receipt of the Supreme Court's decision we have gone over it carefully and searchingly in order that we might have a clear and precise understanding of the basis for such decision.

"Only one thing was clear. That was that the Wisconsin Supreme Court, traditionally liberal and traditionally alert to protect the civil liberties of the citizens of this state, had placed its stamp of approval upon a statute, and an order based thereon, prohibiting minority groups from engaging in those rights guaranteed by the Constitution of the United States. This for the sole reason that they were minority groups."

What counsel refer to is their claim that the act which provides that what is denominated in the opinion "an unauthorized strike", that is, one not made pursuant to a majority vote of employees, is an unfair labor practice, deprives the minority group of a constitutional right to strike and infringes the right of free speech. It is almost futile to attempt to reply to a contention of this kind in the face of the provisions of the statute and the explicit language of the opinion. Counsel continue to misinterpret the [fol. 82] statute and as a consequence, misunderstand the opinion.

Section 111.15 of the Employment Peace Act provides, among other things:

"Except as specifically provided in this chapter nothing therein shall be construed so as to *interfere with or impede or or diminish in any way the right to strike* * * *; nor shall anything in this chapter be so construed as to *invade unlawfully the right to freedom of speech.*"

The last sentence contained in the opinion is:

"Since we interpret the order of the board to be coextensive with the statute as construed, we find it unnecessary to modify the order or judgment."

It is explicitly stated in the opinion that the order of the Board, the judgment of the circuit court affirming it and the opinion of this Court did not deal with anything approaching peaceful picketing. We pointed out—

"In this case it is undisputed that numerous assaults were committed by pickets, that the pickets acted in concert; that the fines of these pickets were paid by the unions; that ingress and egress to and from the premises of the employer were prevented by force and arms. It was at conduct of that kind that the statute was aimed. It is conduct of that kind that is dealt with in this case. It is conduct of that kind that is declared to be an unfair labor practice by the statute and from which the defendants are ordered to cease and desist. The statute does not even declare conduct of that kind to be unlawful, nor does it subject the offender to a criminal prosecution."

How this can be tortured into a statement that minority groups are, by the order affirmed in this case, prohibited from peaceful picketing as described in the Thornhill case, is beyond our understanding. Under the statute and the order of the board as interpreted and construed by the explicit language of the opinion, freedom of speech and the right peacefully to picket is in no way interfered with. The appellants could not be ordered to cease and desist from something they were not engaged in.

[fol. 83] We did not deal with every provision contained in the Employment Peace Act for the reason, as stated in the opinion, upon this appeal sec. 111.06 (2) (e) Stats. 1939,

was the only section of the statute drawn in question and it is with the construction of that section that we deal and it is explicitly so stated in the opinion. We did not attempt because it was not involved in this case to distinguish between what a majority group may do in carrying on a strike from what the minority group may do. We pointed out that the statute nowhere prohibited employees from withdrawing from their employment either singly or in groups and certainly it in no way interferes with the right of free speech. Par. (e) as construed does not prohibit, as described in the Thornhill case, peaceful picketing. We may say this however, that the statute does not authorize the majority group even though it has voted to strike, to commit acts of violence, to take possession of the employer's property and forcibly to prevent ingress and egress to and from the premises.

The appellant employees, unions and officers are not in a position in this case to raise any question respecting the right peacefully to picket or the right of free speech. The picketing carried on in this case was not peaceful and the right of free speech is in no way infringed by the statute or the order of the board.

This Court does not seek applause on the ground that it is progressive and liberal or indeed upon any other ground. The Court has, however, a duty, fairly and impartially to apply and interpret the law in all cases where the rights of citizens are involved to the end that their rights under the constitution and the law may be preserved to them inviolate. This duty it strives to discharge with fidelity to the law and the constitution. As was said in American Furn. [fol. 83½] Co. v. I. B. of T. C. & H. of A. etc. (1936), 222 Wis. 338, 365, 268 N. W. 250, 106 A. L. R. 335, "We conclude that the act as we construe it * * * is a valid exercise of legislative power * * * Whether such laws constitute a wise solution may, of course, be fairly put in question, but the forum for such a controversy is the legislature and not the courts. The question is irrelevant here, and we cannot resist the conclusion that one of the purposes of the labor code was to make it so and to substitute a legislative declaration of policy for the varying standards and views theretofore expressed in judicial opinions."

By the Court—Motion denied with $25.00 costs.

[fol. 84] In Supreme Court, State of Wisconsin

Hotel & Restaurant Employees' International Alliance, Local No. 122, et al., Appellants

vs.

Wisconsin Employment Relations Board, et al., Respondents

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above entitled cause in this Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Madison, this 26th day of May, A. D. 1941.

Arthur A. McLeod, Clerk of Supreme Court, Wisconsin. (Seal.)

[fol. 85] Supreme Court of the United States

No. —, October Term, 1940

Hotel & Restaurant Employees' International Alliance, Local No. 122, et al., Petitioners,

vs.

Wisconsin Employment Relations Board, et al.

Order Extending Time Within Which to File Petition for Certiorari

Upon consideration of the application of counsel for the Petitioners,

It is ordered that the time within which to file petition for certiorari in the above entitled cause be, and the same is hereby, extended to, and including, June 3d, 1941.

Frank Murphy, Associate Justice of the Supreme Court of the United States.

Dated this 4th day of April, 1941.

[fol. 86] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the Supreme Court of the State of Wisconsin is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FREE COPY

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JUN
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL No. 122; PHIL L. VALLEY, JOHN ALEXANDER, AND JACK HEISDORF, EACH INDIVIDUALLY, AS BUSINESS AGENT, ORGANIZER, AND VICE-PRESIDENT, RESPECTIVELY, FOR, AND AS REPRESENTATIVES OF ALL THE MEMBERS OF HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE No. 122;
INTERNATIONAL LAUNDRY WORKERS, LOCAL No. 174;
BARTENDERS INTERNATIONAL LEAGUE OF AMERICA, LOCAL No. 64, SOMETIMES KNOWN AS INTERNATIONAL BARTENDERS & BEVERAGE DISPENSERS, LOCAL No. 64;
INTERNATIONAL UNION OPERATING ENGINEERS, LOCAL No. 311;
MILWAUKEE BUILDING TRADES COUNCIL;
All Affiliated With the American Federation of Labor,
Petitioners and Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD; HENRY C. FULDNER, INDIVIDUALLY AND AS CHAIRMAN OF, L. E. GOODING, INDIVIDUALLY AND AS A MEMBER OF, R. FLOYD GREEN, INDIVIDUALLY AND AS A MEMBER OF THE WISCONSIN EMPLOYMENT RELATIONS BOARD;
PLANKINTON HOUSE COMPANY, A CORPORATION,
Respondents and Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN AND BRIEF IN SUPPORT THEREOF.

JOSEPH A. PADWAY
And
I. E. GOLDBERG,
Attorneys for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL No. 122, ET AL.,
Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Justices of the Supreme Court of the United States:

The above named petitioners respectfully petition for a writ of certiorari to review a decision of the Supreme Court of Wisconsin, 236 Wis. 329, rendered November 8, 1940, motion for rehearing denied January 7, 1941, affirming a judgment of the Circuit Court of Appeals for Milwaukee County, Wisconsin, which sustained, confirmed, and enforced an order made by the Wisconsin Employment Relations Board on February 15, 1940. (The principal decision and the decision on rehearing are set forth as

Appendix "A" of petitioners' brief, attached to this petition at p. 38.)

Summary Statement of Matter Involved.

The individually named petitioners are members and officers of the Hotel & Restaurant Employees International Alliance, Local 122, a labor organization, affiliated with the American Federation of Labor, the membership of which is composed entirely of citizens residing and working in the City of Milwaukee, Wisconsin, and its environs.

The Wisconsin Employment Relations Board is an administrative body, created by Chapter 57, Laws of Wisconsin, 1939, (Wisconsin Statutes, Chapter 111), of which Henry C. Fuldner is the chairman, and L. E. Gooding and R. Floyd Green are commissioners or members.

Chapter 111 is known as the "Wisconsin Employment Peace Act". It was passed by the 1939 Legislature as a substitute for the State Labor Relations Act, patterned after the National Labor Relations Act and passed by the Legislature of 1937, which was repealed.

The so-called "Wisconsin Peace Act" sought to repudiate, and does pervert, the basic principles of the National Labor Relations Act and the 1937 Wisconsin Labor Relations Act patterned after it. The foundation on which the National Labor Relations Act rests is equalization of the bargaining power of employers and employees. The so-called "Wisconsin Employment Peace Act" removes the principle of equalization and again reinvests in employers powers far in excess of those possessed by employers before the passage of any labor relations act in this country.

The entire legislation, Section 111.06(2)(e) of which is in particular challenged herein, is set forth for the Court's convenience as Appendix "B" of petitioners' brief attached to this petition at p. 59.

The Plankinton House Company is a Wisconsin corporation, engaged in the general hotel business, and operating the Plankinton House and the Kilbourn Hotel in the City of Milwaukee, Wisconsin.

The Plankinton House Company employed approximately 160 employees eligible to membership in the petitioning unions, all of which employees were required to become and remain members of such unions pursuant to an all-union agreement entered into between the company and such unions. The unions and the Hotel Company entered into such written agreement on or about June 16, 1938, covering the terms and conditions of employment of the employees of the company, and recognizing the unions as the exclusive bargaining agents for such employees (R. 252).

On May 15, 1939, pursuant to a specific clause in such agreement, permitting the continuation thereof after revision, the unions gave notice to the company that they desired to continue the contract but to negotiate changes therein to become effective for the coming year. The company likewise served notice of proposed changes.

Upon the inability of the parties to agree upon such proposed changes the matter was submitted to an arbitration board, as provided for by the agreement. The arbitration award was unsatisfactory to the unions. The contract provided that if either party was dissatisfied with the award the right to strike or lockout was available. Therefore, pursuant to the contract, a strike was called of the employees, most of the employees of the hotels responding to the strike call (R. 253-256).

No secret vote was held amongst the employees prior to the strike, contrary to the provisions of the "Peace Act," Section 111.06(2)(e) thereof, providing:

> "(2) It shall be an unfair labor practice for an employee individually or in concert with others: • • • (e) To co-operate in engaging in, promoting or induc-

ing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.".

The unions engaged in picketing the entrances to the Plankinton House and the Kilbourn Hotel, and carried banners advising the public of the strike. During the early days of the strike there were some instances of disorder on the picket line consisting in all of 6 simple assaults and 2 instances of delivery stoppage, all occurring between November 4 and November 17, 1939 (R. 257-259).

The Plankinton Hotel Company complained to the Wisconsin Employment Relations Board, charging the petitioning unions, their officers, agents, and members, with having committed unfair labor practices by engaging in the concomitants of a strike although a majority of the employees had not first voted by secret ballot to call such strike, and praying that their picketing activities be restrained and enjoined (R. 58).

Petitioners answered and in their answer challenged the constitutionality of the legislation under which the Board purported to act (R. 70).

After a hearing and the taking of evidence, the Wisconsin Employment Relations Board, on February 15, 1940, made its findings of fact and conclusions of law and entered an order restraining the unions, their officers, agents, successors, and assigns, from

"(a) Engaging in, promoting, or inducing picketing at or near the Plankinton House, or the Kilbourn Hotel;

* * * * * * *

"(c) Boycotting in any way the Plankinton House Company." (R. 251-262.)

The reasons for this order were stated by the Board, both in its Conclusions of Law and Decision, to be as follows: the respondent unions were "guilty of unfair labor practices by cooperating and engaging in promoting and inducing picketing and boycotting, all being overt concomitants of a strike, without first obtaining the approval of the majority of the employees of the Plankinton House Company by a secret ballot." (R. 259-260; R. 267-268.)

Pursuant to the method for appeal provided in the statute (Sec. 111.07(8)), the petitioning unions sought review and the setting aside of such order in the Circuit Court of Milwaukee County, Wisconsin, by petition which alleged in part that the order of the Board and the Act on which the order was based were unconstitutional and void as being repugnant to the Fourteenth Amendment to the United States Constitution (R. 2-6). The Board cross-petitioned for enforcement (R. 6). The Plankinton House Company, upon petition, was permitted to intervene as a party (R. 11). The Circuit Court affirmed, sustained and enforced the Board's order in its entirety by decision (R. 12-47), and by appropriate decree (R. 47-51), violation of which would be punishable by contempt.

The petitioning union then appealed to the Supreme Court of the State of Wisconsin, again raising on appeal the constitutional questions as aforesaid (R. 53). The Supreme Court affirmed the judgment of the Circuit Court for Milwaukee County on November 8, 1940, and upheld the Board's order prohibiting all picketing and boycotting in its entirety (R. 64).

Motion for rehearing was made and was denied by the Wisconsin Supreme Court on January 7, 1941, in a supplemental decision (R. 65 and 69).

In its principal decision the Court found that the "Peace Act" did not violate any constitutional prohibitions, specifically finding that the majority-minority classification

was a valid one.[1] It stated that the Act did not deprive anyone of the right to free speech, declaring, in addition, that in the case before it the occurrence of acts of violence had warranted the order in question. In its supplemental opinion on rehearing, the court seemed to rely heavily on the element of violence to sustain the order. (See R. 52 and 65. Or see Appendix "A" attached to brief, pp. 38 and 56.)

Statement as to Jurisdiction.

This case is one over which the Court has jurisdiction under the provisions of the Act of Congress of February 13, 1935, Section 237-b, 28 U. S. C. A., Section 344-b, giving jurisdiction to this Court:

> "to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by appeal any cause wherein a final judgment or decree has been rendered and passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any state on the ground of being repugnant to the Constitution or laws of the United States; or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution . . . "

This case is one in which the validity of the statutes of the State of Wisconsin, to wit, Sections 111.01 through 111.19, Wisconsin Statutes, 1939, particularly Section 111.06 (2)(e) thereof, and an order and enforcing judgment based

[1] Although the "Peace Act" contained other provisions which were vulnerable to constitutional attack, the Wisconsin Supreme Court passed only upon the validity of Section 111.06(2) (e) of the "Peace Act". Thus, for instance, Section 111.02(8) of the "Peace Act", defining a labor dispute, limits the permitted disputants to the "employer and the majority of his employees". Cf. *American Federation of Labor* v. *Swing*, decided February 10, 1941.

thereon, is drawn in question upon the ground that such statutes, order and judgment, on their face and as construed in the opinion and judgment of the Supreme Court of the State of Wisconsin, are repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, as depriving the petitioners of liberty or property without due process of law, denying to the petitioners the equal protection of the laws, and more particularly, denying to the petitioners freedom of speech. The decision of the Wisconsin Supreme Court was in favor of the validity of the statute and order.

The said Supreme Court of the State of Wisconsin rendered its decision herein on November 8, 1940, and in a second opinion rendered on January 7, 1941, by the Honorable Marvin C. Rosenberry, Chief Justice of said Supreme Court, denied a rehearing.

On April 4, 1941, Mr. Justice Murphy, by appropriate order, extended the time for filing of this petition until June 3, 1941 (R. 72).

Said opinion of the Supreme Court of the State of Wisconsin, the last resort in all causes in the State of Wisconsin, is officially reported in 236 Wis. 329, 294 N. W. 632, 295 N. W. 634, and, as aforementioned, is attached at end of brief as Appendix "A."

The petitioning unions argued before the Wisconsin Employment Relations Board (R. 77-80), before the Circuit Court for Milwaukee County (R. 2-6), and before the Supreme Court of the State of Wisconsin (See decision, R. 53), that Section 111.06(2)(e) of the Wisconsin Statutes and the order of the Board were unconstitutional, void, and of no effect whatsoever because they were repugnant to the Fourteenth Amendment to the Constitution of the United States, as depriving petitioners (1) of freedom of speech and assembly, (2) of the equal protection of the

laws, and (3) of liberty and property, without due process of law.[2]

The Federal question of whether the Wisconsin Statutes in question and the order of the Board based on such statutes violated the Constitution of the United States thus was raised before every tribunal in which argument was heard.

The Supreme Court of Wisconsin specifically held that neither the statute nor the order deprived petitioners of any rights guaranteed under the Fourteenth Amendment to the Constitution of the United States, the court stating,

> "We discover no invasion of the right of free speech either in sub. (2)(e) 111.06 Stats. 1939, or in the way the law was administered by the Board in this case." (R. 64; App. "A", p. 55.)

While the principal decision of the Wisconsin Supreme Court, together with the decision on petition for rehearing, are in some respects somewhat difficult to fathom, the following is clear:

1. The Federal question of whether a requirement that the majority of employees in a bargaining unit must au-

[2] Under the Wisconsin Supreme Court practice errors are assigned in the brief. In the brief of petitioners herein, appellants before the Wisconsin Supreme Court, under the title "Errors Assigned" (pages 24-25), it is specifically set forth as follows:

"(1) The Circuit Court for Milwaukee County erred in affirming that order for the Wisconsin Employment Relations Board requiring the appellant Unions, their officers, members, agents, successors and assigns, to cease and desist from engaging in promoting or inducing picketing at or near the Plankinton House or Kilbourn Hotel and from boycotting in any way the Plankinton House for the reason that:

"(a) Section 111.06(2) (e), upon which such order is based, is unconstitutional, void and of no effect whatsoever, being contrary to the Fourteenth Amendment to the Constitution of the United States and Article 1 of the Constitution of the State of Wisconsin.

"(b) Such order deprives the Unions, their officers, members and agents from exercising the constitutional rights of freedom of speech, press and assemblage, guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article 1 of the Constitution of the State of Wisconsin."

thorize a strike before peaceful picketing pursuant thereto can be permitted violates the Fourteenth Amendment, either because it deprives of the right to free speech or because it denies the equal protection of the laws, was passed upon in favor of its validity in the principal decision; (R. 59) Appendix "A", p. 50 and

2. In both decisions the Federal question of whether the order prohibiting all picketing and all boycotting, either as predicated upon the statute or as predicated on the facts and circumstances of the case, including the alleged violence, violated the Fourteenth Amendment was determined in favor of its validity (R. 64 and 69; Appendix "A", pp. 55, 56).

Some of the cases relied on in the courts below (except *Meadowmoor*, not then decided), and which the petitioners believe are in support of their position, and which will influence the decision of this Court, are as follows:

Thornhill v. *Alabama*, 310 U. S. 88;
Carlson v. *California*, 310 U. S. 106;
Senn v. *Tile Layers' Protective Union*, 301 U. S. 468;
American Federation of Labor v. *Swing*, 85 L. Ed. (Adv. Op.) 513;
Milk Wagon Drivers' Union v. *Meadowmoor Dairies, Inc.*, 85 L. Ed. (Adv. Op.) 497.

A copy of the entire record in this case, as certified to be true and correct by the Clerk of the Supreme Court of the State of Wisconsin, is hereby furnished, attached to, and made a part of this application in compliance with rule 38, paragraph 1, of the rules of this Court.

Questions Presented.

The following Federal questions, raised and argued before the Supreme Court of Wisconsin, are again brought forward here:

1. Is Wisconsin's so-called Peace Act, particularly Section 111.06(2)(e) prohibiting employees in a bargaining

unit from peaceful picketing or boycotting in connection with a strike, unless a majority in such unit have authorized the strike, void as contrary to the Fourteenth Amendment, depriving of the right to free speech and denying the equal protection of the laws?

2. Does the limited violence connected with the picketing in this case warrant curtailment of the right to discussion guaranteed by the Fourteenth Amendment through application by the Wisconsin Supreme Court of the principle or doctrine of the *Meadowmoor* case?

3. Even assuming the *Meadowmoor* doctrine applicable, did the Wisconsin Supreme Court err in not limiting the scope of the order to the proper confines of that doctrine so as to permit publicity practices involving no violence?

Reasons Relied on for Allowance of Writ.

1. The decision of the Supreme Court of Wisconsin is in conflict with the decisions of this Honorable Court in *Thornhill* v. *Alabama, supra; Carlson* v. *California, supra; American Federation of Labor* v. *Swing, supra;* and *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies, Inc., supra.*

2. The question of the constitutionality of state legislation attempting to limit peaceful activities in connection with a strike, whether such activities consist of picketing or the boycott, to a situation in which the majority of employees in a particular unit have authorized such strike is, for the first time, presented to this Honorable Court for consideration. Such legislation, if left unchallenged, has inherent in it the danger of deprivation of constitutional rights to minority labor groups throughout the country under guise of a pseudo democratic procedure. Rights for which organized labor throughout the country has fought for years are threatened by this novel and dangerous type of legislation.

3. A perverted application of the doctrine of the *Meadowmoor* case has been relied upon by the court below to deny to workers constitutional rights. If uncorrected, it will permit the principle expressed in the *Meadowmoor* case to be extended to situations not contemplated under that decision and afford precedent for further disregard of constitutional restraints.

Prayer for Writ.

WHEREFORE, Your petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the clerk of the Supreme Court of the State of Wisconsin, commanding that court to certify and send to this court for review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered 68 and entitled *Hotel & Restaurant Employees' International Alliance, Local No. 122, et al.*, v. *Wisconsin Employment Relations Board, et al.*, and that the judgment of the Supreme Court of the State of Wisconsin may be reviewed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem just and meet; and your petitioners will ever pray.

JOSEPH A. PADWAY
and
I. E. GOLDBERG,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL No. 122, ET AL.,
Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinion of the Court Below.

The opinion of the Supreme Court of the State of Wisconsin is reported in 236 Wisconsin 329, and is appended hereto as Exhibit "A."

Jurisdiction.

The statutory provision believed to sustain the jurisdiction of this Court is Title 28 U. S. C. A., Section 344-b (Judicial Code, Section 237(b), as amended by the Act of February 13, 1925).

As seen in the jurisdictional statement in the foregoing petition, the constitutional objections to the legislation upon

which the present order forbidding all picketing, peaceful or otherwise, is based, and to the order itself, were raised and argued before every tribunal in which it was possible to raise and argue such questions, including the State Labor Relations Board, the Circuit Court of Milwaukee County, to which appeal from the Board's order must first be taken, and then in the Supreme Court of the State of Wisconsin, court of last resort for all causes in the State. The constitutional objections were discussed and passed upon by the Supreme Court of the State of Wisconsin, which court determined that such objections were not available to petitioners, and that the legislation and order did not invade any constitutional rights.

Statement of the Case.

A summary statement of the case appears in the Petition for Writ of Certiorari, which, in the interest of brevity, is incorporated herein by reference.

Specification of Errors.

The Supreme Court of the State of Wisconsin erred in the following respects:

In holding that Section 111.06(2)(e), Statutes 1939, was not violative of the Fourteenth Amendment to the Constitution of the United States.

In sustaining those portions of the order of the Circuit Court for Milwaukee County, Wisconsin, enforcing the order of the Wisconsin Employment Relations Board which provided that your petitioners

> "1. Immediately cease and desist from
>
> (a) Engaging in, promoting, or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;
>
> * * * * * * *
>
> (c) Boycotting in any way the Plankinton House Company."

In sustaining the order so as to deny or prevent peaceful activities unattended by violence, disorder, or breach of the peace intended to make known the facts of the controversy between employees and employers.

ARGUMENT.

I.

Section 111.06(2)(e), Wisconsin Statutes, 1939, is Unconstitutional and Void and of no Effect Whatsoever Because It Contravenes the Guaranties of Free Speech and Equal Protection of the Laws Afforded by the Fourteenth Amendment to the Constitution of the United States.

The first question presented for consideration is whether Section 111.06(2)(e), prohibiting peaceful picketing in connection with a strike where such strike was not authorized by a majority of employees in a particular unit, contravenes the Fourteenth Amendment.

Some doubt may be raised as to whether this particular issue is involved by reason of the fact that the Wisconsin Supreme Court, in its supplementary opinion rendered on the petition for rehearing, indicated that it was not concerned with what a minority or a majority could or could not do and that the violence warranted the blanket prohibition against all picketing and all boycotting. However, that the constitutionality of Section 111.06(2)(e) is involved in this case is conclusively indicated by the following facts:

1. The State Labor Relations Board predicated its order prohibiting all picketing specifically and solely on the fact that petitioners had not complied with Section 111.06(2)(e) in securing the majority strike vote called for therein. See its Conclusions of Law 2 and 3 (R. 259) and its Memorandum Decision (R. 267). The element of

violence was not relied upon by such Board to support its order. Certain named individuals were found to have committed unfair labor practices by virtue of the misdemeanors committed by them (R. 260), but the only unfair labor practice found to have been engaged in by the respondent unions, petitioners herein, was the failure to secure the majority vote.

2. The decision of the Circuit Court for Milwaukee County, sustaining the order in its entirety, was again based upon the failure of petitioners to comply with Section 111.06(2)(e), and that court upheld Section 111.06(2)(e) as a valid exercise of the State police power. Here again, the element of violence was not relied upon to sustain the order. See Circuit Court decision (R. 12).

3. Most important is the fact that the principal opinion of the Supreme Court of Wisconsin deals at length with the validity of Section 111.06(2)(e), and that opinion specifically affirms the validity of that section as a valid exercise of the police power. This opinion has never been withdrawn. In addition, however, the element of violence is, for the first time, brought into the case as a partial basis for sustaining the Board's order.

The issue of the constitutionality of Section 111.06(2)(e) is thus seen necessarily to have been before the Wisconsin Supreme Court and was necessarily passed upon by that court. It was on that section of the statute, and on that alone, that the order against the unions was predicated. But for that order, the restraint against all picketing and all boycotting, finally upheld by the Supreme Court, would never have been issued in the first place. Any attempt by the Supreme Court in its supplementary opinion after motion for rehearing to circumvent passing upon the constitutionality of that section must be regarded as "so plainly unfounded that it may be regarded as essentially

arbitrary or a mere device to prevent review of the decision on the Federal question." See *Leathe* v. *Thomas*, 207 U. S. 93, 99; *Ohio State Bank* v. *Bryan*, 282 U. S. 765, 774; *Johnson* v. *Risk*, 137 U. S. 300, 307.

In the present case, no question exists as to the legality of the purposes of the strike or the justification for the picketing. We have merely this simple and ordinary factual situation:

A group of unions have a contract with an employer. Upon the expiration of the contract, the unions seek improved terms. The employer refuses to accede to the proposed terms. The unions strike, and commence picketing and boycotting in support of such strike. The picketing and boycotting are enjoined under the "Peace Act" because such unions have refused to obtain a vote of employees to see whether a majority of them favor the strike, as required by Section 111.06(2)(e).

Does Section 111.06(2)(e) deprive the unions and their members of freedom of speech? And further, does Section 111.06(2)(e) deprive minority groups of the equal protection of the laws?

A.

SECTION 111.06(2)(e) IS NOT A PROPER EXERCISE OF THE STATE'S POLICE POWER AND UNLAWFULLY DEPRIVES PETITIONERS OF THE RIGHT TO FREEDOM OF SPEECH.

If the right peacefully to picket and boycott to inform the public of the facts of a labor dispute, and to marshall public opinion on the side of the worker, is, as many times determined by this Honorable Court, a concomitant of the right to free speech, surely this constitutional right is not one the exercise of which can be made dependent upon the wishes of a majority in a particular bargaining unit. Surely, it cannot be said that such a clear danger of sub-

stantive evils arises in cases of minority strikes or minority picketing or minority boycott as to justify an exercise of the state's police power in this respect.

1. "Picketing, Boycotting or Any Other Overt Concomitant of a Strike" When Peacefully Carried on Are Synonymous With the Terms "Free Speech" and "Liberty" as Those Terms Are Used in the Fourteenth Amendment to the Constitution of the United States.

The decisions of this Court in the cases of *Thornhill* v. *Alabama*, 310 U. S. 88, and *Carlson* v. *California*, 310 U. S. 106, as well as its most recent pronouncements in the cases of *Milk Wagon Drivers Union, et al.*, vs. *Meadowmoor Dairies Inc.*, 854 L. Ed. (Adv. Op.) 497, and *American Federation of Labor* v. *Swing*, 85 L. Ed. (Adv. Op.) 513, have identified picketing and boycotting as the "working man's means of communication," and as synonymous with the term "free speech," which is within the protection of the Fourteenth Amendment to the Constitution of the United States from abridgment by the states.

In the *Thornhill* case this Court very significantly stated:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."

In the *Carlson* case this Court stated:

> "For the reasons set forth in our opinion in Thornhill *v.* Alabama, supra, publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth, or banner, must now be regarded as within that liberty of communication which is secured to every person by the

Fourteenth Amendment against abridgment by the State."

American Federation of Labor v. *Swing*, 85 L. Ed. (Adv. Op.) 513;
Senn v. *Tile Layers' Protective Union*, 301 U. S. 468;
C. I. O. v. *Hague*, 307 U. S. 196;
Schneider v. *State*, 308 U. S. 147;
Lovell v. *Griffin*, 303 U. S. 444.

2. Section 111.06(2)(e) Is to Be Tested on Its Face.

The Supreme Court of the State of Wisconsin did not test Sec. 111.06(2)(e) on its face, nor did it test the order entered thereon on its face, but wrote a tortured opinion seeking to justify the distinctions between majority and minority action on the basis of claimed distinctions between what was prohibition in the Alabama statute (*Thornhill* case) and what was only claimed regulation under the Wisconsin statute.

The Wisconsin Supreme Court stated in its opinion, with reference to the *Thornhill* case:

> "As construed by the state court it (the Alabama statute) prohibited the publishing of the facts of a labor dispute either by printed sign, by pamphlet, by word of mouth or otherwise. The Peace Act deals with concerted action in carrying on an unauthorized strike by the usual overt acts concomitant of a strike." (R. 55, Appendix "A", p. 45.)

The court also sought to justify its refusal to follow the *Thornhill* case by stating that Section 111.06(2)(e) does not invade the right of freedom of speech because "the right of the individual to freedom of speech is by the terms of the act left unimpaired. It is the right to concert of action that is regulated." (R. 64, Appendix "A", p. 55).

The Wisconsin court further stated that Section 111.06

(2)(e) does not forbid picketing, but rather "attempts to regulate it and to provide under what conditions and circumstances picketing may be carried on by striking employees." (R. 55, and Appendix "A", p. 46.)

It is apparent from the few excerpts above quoted that the court did not seek to test this statute on its face at all, but sought to distinguish it from the statute before this court in the *Thornhill* case by drawing superficial and insubstantial distinctions.

This court in the *Thornhill* case stated that the statute had to be judged upon its face, pointing out that

> "proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. • • • It is not the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. • • • *where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression.* • • • " (Emphasis ours.)

The emphasized portion above is pertinent in the instant case in view of the undue emphasis placed by the Wisconsin court in its opinion on the motion for rehearing on isolated acts of violence which the Wisconsin Employment Relations Board found had occurred. Yet the board did not base its order on those few misdemeanors. Nor did the Wisconsin Supreme Court in its first opinion. The section should have been considered on its face inasmuch as the board had ample authorization under other sections of the statute to deal with cases involving violence or breach of peace. See Section 111.06(2) subsections (f) and (g) where

violence is specifically dealt with as a distinct and separate unfair practice. In spite of these sections where violence is separately treated, the court attempted to justify Sec. 111.06(2)(e) (majority-minority strike) on a "violence" theory.

3. Section 111.06(2)(e) Is Not Valid as a Proper Exercise of the Police Power of the State

Deprivation of the liberty of discussion in labor disputes can be permitted only when such deprivation is nece sary to prevent a clear and present danger of the destruction of life and property or the invasion of the right of privacy. Freedom of speech can be abridged only when clearly necessary for the protection of some real and apparent danger to public safety, health or morals. As stated by the court in the *Thornhill* case, *supra*:

> "Abridgement of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."

Indeed, as stated by Justice Reed in his dissent in *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies, Inc., supra:*

> "This nation relies upon public discussion as one of the indispensable means to attain correct solutions of problems of social welfare. Curtailment of free speech limits this open discussion. Our whole history teaches that adjustment of social relations through reason is possible while free speech is maintained. *This Court has the solemn duty of determining when acts of legislation or decrees of courts infringe that right guaranteed to all citizens. Free speech may be absolutely prohibited only under the most pressing national emergencies. Those emergencies must be of the kind that justify the suspension of the writ of*

habeas corpus or the suppression of the right of trial by jury." (Italics supplied.)

Clearly, no inherent danger to public property, health, safety or morals is present when peaceful picketing is carried on by a minority of employees rather than by a majority. No reason appears, nor has been offered, why peaceful picketing by minority groups is any more inherently dangerous to the public safety than peaceful picketing carried on by majority groups. The only possible reason which could be asserted in support of Section 111.06(2)(e) as a proper exercise of the police power is that picketing by minority rather than majority groups must necessarily and in all instances result in danger to public health, safety or morals. Such a contention has not been made and would, of course, be preposterous.

4. The Right To Disseminate Information Not Limited To Employer-Employee Relationship

The right of labor to disseminate information concerning controversies with employers must be placed upon the broadest basis, and is not limited to certain types of controversies as, for example, those specifically and directly involving only "wages, hours or working conditions", nor is it limited to controversies where immediate employees of the employer affected are disputing, or to where a particular class of employees are involved.

This question was definitely laid to rest by the decision of this Court in the case of *American Federation of Labor* v. *Swing, supra.* In that case an injunction of an Illinois court, restraining picketing and boycotting because there was no direct dispute between the working employees and their employer, was held to be an unconstitutional restraint of the right of free speech. The court stated:

"The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. American Foundries *v.* Tri-City Council, 257 U. S. 184, 209. The right of free communication cannot, therefore, be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. *Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's case.* 'Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.' Senn *v.* Tile Layers Union, 301 U. S. 468, 478." (Italics ours.)

Under this decision the State cannot make the right to picket dependent upon whether or not majority or minority groups of employees have approved in a secret written ballot. This decision quite obviously means that a State may not pick and choose between different types of "lawful" labor disputes, permitting the exercise of free speech and press as to some, and prohibiting the exercise of those rights as to others.

The constitutional right of Wisconsin workmen to *peacefully* disseminate information concerning an employer's labor practices by any of the methods falling within the "vague contours of the term 'picket'"

(*Thornhill* case) cannot be abridged by the state merely because the exercise of such right had not been previously licensed by a majority in a secret ballot vote of the employees of the particular employer involved.

The attempt under the present legislation to limit the area of economic conflict, or to limit the class of persons who may lawfully engage in economic conflict for the betterment of their conditions, would operate to prohibit efforts of Labor to improve its condition in many situations where it has heretofore found picketing and boycotting and other attempts to gain public support through publicizing the facts of a labor dispute not only helpful but vitally necessary. Thus, in the initial stage of organization Labor often finds picketing necessary either to perfect organization, or to achieve recognition, or to combat abuses or acts of discrimination by the employer. Abuses and discrimination are of much more frequent occurrence at the early stages of organization. If Labor is obliged to wait until an entire plant or a majority of an entire plant is organized before it can strike and picket, it will be unable to strike and picket or boycott, for the purpose not only of improving wages and hours and other working conditions, or of perfecting organization, or of securing recognition, but even of protecting itself against discharges or other unfair practices by the employer.

B.

SECTION 111.06(2)(e) OF THE WISCONSIN STATUTES AND THE ORDER BASED THEREON DENY TO THESE PETITIONERS THE EQUAL PROTECTION OF THE LAWS, SINCE THE STATUTE DOES NOT EMBODY REASONABLE CLASSIFICATION.

Under Section 111.06(2)(e) a minority group or a majority group, not having previously balloted, when engaging in conduct therein referred to, is subject to be summoned

before the Wisconsin Employment Relations Board to make answer there to the employer complaining about such conduct, whereas a majority group, having previously voted in a secret ballot in favor of a strike, engaging in the same conduct is not so subject to the operation of the law.

A most obvious defect in such classification is indefiniteness as to numbers. A minority group may be one employee in the case of a small establishment of three employees, or may consist of four or five thousand employees, as in the case of large industrial units. Likewise, a majority group might be as little as two and as many as eleven or twelve thousand. We are unable to find any reason in such classification. It is not a classification based upon environment, circumstances, nature of occupation, type of business, public interest involved, public health involved, public morals or safety; it has no relationship to the location of the plant or establishment, whether in an industrial or residential section, whether in a heavy traffic area or light traffic area, whether in an adequately policed area or not. It sets no definite arithmetical standard other than majority or minority. It says in one case two may do certain acts and in another case five thousand may not. It provides that in the same plant of 10,000 employees, with the same controversy over the same matters, five thousand and one may do an act, but four thousand nine hundred ninety-nine may not.

The question before discussed again presents itself—what is there inherent in the mere taking of a vote, or the failure to take a vote or the acquiescence by a majority to strike, which in the one instance presupposes that the picketing will not present a clear and present danger to the lives and property of citizens, and which, in the other instance, assumes that such clear and present danger will arise in every case of peaceful picketing?

It is clear that the Legislature has recognized that there is no inherent danger to the public in picketing carried on by a majority after an affirmative strike vote. The Wisconsin Supreme Court has not pointed out, nor has opposing counsel attempted to point out, any inherent difference between picketing carried on by a majority and picketing carried on by a minority who have failed to obtain a majority strike vote. Obviously, there is no such inherent difference which would permit the Legislature to presume that in the one case danger to the public would never result, and in the other case such danger *would always and in every instance result.*

The Supreme Court of Oregon, in *American Federation of Labor* v. *Bain*, 106 Pac. (2d) 544, was confronted with a statute passed by referendum vote of the people of Oregon, which likewise attempted to confine the right to picket to situations where the majority in an appropriate unit had voted to strike. The Supreme Court of Oregon found that such an attempted classification was unreasonable, had no proper relation to the purpose of the legislation, and denied to the minority group the equal protection of the laws. That court stated in this respect as follows:

> "The law's implied recognition of the right of the majority to picket when engaged in a controversy with their employer relating to wages, hours or working conditions, is also a recognition that picketing, peacefully conducted in those circumstances, does not give rise to 'the clear danger of substantive evils,' which alone may justify abridgment of the right. On what theory, then, can the abridgment of the right of the minority be supported? There is not inherently a difference in picketing, either with respect to the manner in which it is carried on, or the consequences to those who may be affected by it, based on the number of employees who may be disputing with their employer. On the contrary, whether engaged in on behalf of a few or many, picket-

ing may be peaceful or otherwise for a lawful or unlawful purpose, by a single individual or en masse, and fraught with either negligible or serious consequences to the employer and the public. See *People* v. *Gidaly*, 35 Cal. App. (2d) 758, 93 P. (2d) 660. Besides the invalid classification which the Court found in the cited case is a similar law, the fundamental defect of the statute, in the light of the Supreme Court's decisions is, that it is not aimed at specific evils which the state without doubt has power to correct; but the prohibition, to the extent that it applies, is as broad as that condemned in the Thornhill and Carlson cases, and like the enactments there considered, 'sweeps within the ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press.'

"The fundamental constitutional right which the Supreme Court sustained in the cited cases was declared to be secured to 'every person'. We see no escape from the conclusion that the denial of such a right to the members of a minority is no less an unconstitutional abridgment of the right simply because it is saved to the majority."

It is interesting to note the Wisconsin Court's remarks with respect to the argument that majority rule is a fundamental tenet of our constitutional system. The argument is made that Section 111.06(2)(e) is merely an application of the majority rule, which is an essential part of our democracy. Attention is called to the majority rule provisions of the various labor relations acts and to the majority rule provision with respect to elections. However, the proponents of that argument overlook the very obvious fact that in those cases where the majority have made their selection the minority is, nevertheless, free to continue to exercise their constitutional rights without restraint. The Republican party today is still free to criticize all of the policies and practices of the majority-elected Democratic

President. Those who did not vote for our President, while bound by the results of the election, are, nevertheless, free to express their opinions concerning his conduct of our Government's affairs and so express themselves in the hope that they may establish a majority in the next election to defeat him.

The bulwark of our democratic form of government lies in *the constitutional guaranties that any person, regardless of whether such person is a member of a majority group or not, is entitled to the free expression of his own opinions and is liable only for the abuse thereof.*

There can be no question but that the attempted distinction in Section 111.06(2)(e) between majority and minority groups is an arbitrary one, is based on no ground of difference which has a fair relation to the object of the legislation, and unreasonably discriminates against the minority class. As such, the legislation and the order based upon such legislation are void as contrary to the Fourteenth Amendment. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

II.

The Decision of This Court in the Case of Milk Wagon Drivers of Chicago vs. Meadowmoor Dairies, Inc., Supra, Is Not Applicable.

A. The Basis for the Board Order as Seen by Board Decision, Circuit Court Decision and First Supreme Court Decision was Failure to Obtain Majority Vote and Not Violence.

The original decision of the Wisconsin Supreme Court in this case was very clearly and definitely based upon the holding of that court that distinguishing between what a majority may do in furtherance of an authorized strike and what a minority may do in furtherance of an unauthorized

strike constituted a valid exercise of the police power of the State of Wisconsin, and operated as a regulation of the right of free speech rather than a prohibition thereof.

On the motion for rehearing the court asserted that its opinion dealt only with the construction of Section 111.06(2)(e), and asserted that "the appellant employees, unions, and officers are not in a position in this case to raise any question respecting the right peacefully to picket or the right of free speech. The picketing carried on in this case was not peaceful, and the right of free speech is in no way infringed by the statute or the order of the Board."

In our opinion the Wisconsin Supreme Court on the motion for rehearing sought deliberately to remove from this case any possible grounds for appeal to this Court. On the motion for rehearing it sought to place the decision upon a non-Federal ground entirely, and to assert that the decision was based upon the isolated acts of violence which occurred during the early days of the strike.

On March 21, 1941, the respondent unions, together with the president and secretary of the Wisconsin State Federation of Labor, and many other prominent Milwaukee and Wisconsin labor representatives were ordered to show cause before the Circuit Court for Milwaukee County, Wisconsin, why they should not be held in contempt of court for having violated the order which was affirmed by the Supreme Court of the State of Wisconsin (Case No. 170-382, Circuit Court, Milwaukee County, Wisconsin).

In that case it was the position and contention of the Attorney General for the State of Wisconsin, on behalf of the Wisconsin Employment Relations Board, that the order of the board prohibits entirely and completely all peaceful picketing, and all attempts, by word of mouth, letter, or otherwise, to induce or persuade others not to patronize the Plankinton Hotel and its employees.

Certainly the broad language of the order appealed from would justify such action. The order of the Board does prohibit all picketing and boycotting. It is argued in justification of the order that the Supreme Court of the State of Wisconsin merely anticipated the holding of this Court in the *Meadowmoor* case, and that on the basis of isolated acts of violence occurring in the early days of the strike the order prohibiting all picketing and boycotting was affirmed by the court.

There is absolutely no place in the findings of the board or in the order of the board, nor in its memorandum decision, any holding, indication, implication, or inference of any kind whatsoever that the board found that the activities of the union were "set in a background of violence," or that "it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful". (*Milk Wagon Drivers, etc., v. Meadowmoor Dairies, Inc., supra.*)

As a matter of fact, the memorandum decision accompanying the order of the Board clearly points out that the order prohibiting picketing and boycotting is based upon the fact that

> "Before going on strike, no vote by secret ballot authorizing the strike, was taken among the employees of the hotel. This, under Chapter 111 of the Wisconsin Statutes, is clearly an unfair labor practice, and all of the employees taking part in such strike are necessarily parties to such unfair labor practice. * * * To many this result may seem to be harsh penalty, *but it is a result that flows naturally from this law, and is something which this board as an administrative board has nothing to do with.*" (Italics ours.) (R. 851, 852.)

The decision of the Board in no way refers to the acts of violence nor characterizes the union campaign as being

one so marked by violence that peaceful picketing is impossible under the circumstances. Reference to the order of the Board indicates that the findings of fact with reference to the acts of violence are made only to sustain the conclusion of law that the persons named have committed unfair labor practices. This conclusion of law (R. 844) does not refer to or involve the union, nor are the activities of the individually named persons attributed to the union.

The Board specifically found in conclusion of law No. 2 (R. 844) that the respondent unions are guilty of unfair labor practices *only by virtue of the employees having gone out on strike without first obtaining the approval of the majority by secret ballot.*

The board ordered these petitioners to cease and desist from intimidation, force, or coercion, and properly so. This, however, was not tantamount to a finding of the Board that the peaceful activities engaged in by these organizations and their members are coercive, intimidating and injurious, and must, therefore, be prohibited in their entirety. That this is not so was recognized by the Circuit Court in its grant of a qualified stay of judgment, permitting peaceful activities during certain hours of the day and under certain circumstances (R. 52-57).

A careful examination of the findings of fact, conclusions of law, order, and memorandum (R. 846-854) fail to disclose any finding by the Board, express or implied, that the union had ratified or authorized the conduct of such employees, or that the unions by virtue of any such authorization or ratification have committed an unfair labor practice which results in denying to them the right to peacefully picket.

Certainly, it must be apparent that the few isolated acts of violence were not relied upon by the Board to justify the order prohibiting all picketing and all boycotting. As

a matter of fact, a part of the order of the board relates to the violence and provides as follows:

> "1. Immediately cease and desist from:
>
> * * * * * * *
>
> (b) Attempting to hinder or prevent by threats, intimidation, force, or coercion of any kind, the pursuit of lawful work by employees of the Plankinton House Company."

Therefore, it is obvious that the order prohibiting picketing and boycotting in no way and no sense was based upon any finding by the board that conduct engaged in by some of the pickets was of such nature that all picketing and boycotting could be restrained under the decision of this Court in the *Meadowmoor* case.

B. Assuming That Violence Was the Basis for the Order Prohibiting All Picketing and Boycotting, Such Order Cannot Be Supported by the Facts.

In the *Meadowmoor* case it was clear that the injunction of the court below was prompted by a situation of unusual and extraordinary violence from which it "could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful," and which acts of violence were "neither episodic nor isolated."

This Court also made it abundantly clear, however, that constitutional freedom was not to "be defeated by insubstantial findings of fact screening reality," and that, therefore, "this Court has the ultimate power to search the records in the State courts where a claim of constitutionality is effectively made." This Court pointed out that "the right of free speech cannot be denied by drawing from a trivial, rough incident or a moment of animal exuberance

the conclusion that otherwise peaceful picketing has the taint of force."

Accepting the findings of fact by the State board as a verity in the instant case we find that the strike occurred on November 2, 1939, and that hearing was had before the Wisconsin Employment Relations Board beginning with the 1st day of December, 1939. From November 4 through November 17, 1939, six pickets were arrested and fined in police court on charges of assault and battery, and on two occasions deliveries to the Plankinton Hotel were prevented by pickets by means of force (R. 257-259). The entire findings of the State Board in respect to violence appear on pages 257-259 of the Record as set forth in footnote 3 below:

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[3] 19. On November 4, 1939, union pickets, by means of force, prevented delivery to the Plankinton House of floral decorations by one Joseph Mueller, an employe of August F. Kellner Company. That as a result of the altercation at said time Jack Heisdorf, vice-president of Local No. 122, Hotel and Restaurant Employees International Alliance, and Charles McLaughlin, assistant to the secretary of Local No. 122, were arrested, and on November 17, 1939, convicted of assault and battery, McLaughlin being fined $10.00 and costs and Heisdorf being fined $5.00 and costs, the sentence against Heisdorf being suspended and he was placed on probation for thirty days. That Local No. 122 provided counsel and bail for both Heisdorf and McLaughlin and paid McLaughlin's fine.

20. Charles McLaughlin returned to the picket line immediately after his arrest, and on November 17, 1939, assaulted one Lester Raasch, an employe of the Plankinton House, was again arrested, convicted and fined $25.00 and costs and the union again provided him with counsel and paid such fine.

21. On November 4, 1939, two salesmen representing the Automotive Electrical Association, who were attempting to deliver displays and samples to the Plankinton House, were, by means of force, prohibited from making the delivery by Phil L. Valley and a number of pickets.

22. On November 10, 1939, Jack Heisdorf, Charles Alden, striking employe of the Plankinton House, and other pickets, by the use of force, prevented delivery of ice cubes to the Plankinton House, and in the course of the attempted delivery, Charles Alden assaulted Robert Jeske, then an employee of the Plankinton House.

23. On November 17, 1939, Paul Ziebell, an employe of the Plankinton House, was assaulted by James O'Brien, a picket employed by the union,

Certainly, by no stretch of the imagination could such fugitive encounters, occurring only in the early days of the strike, when feelings usually run highest, be held to justify a complete restrain on all peaceful picketing and boycotting activities in the future. The Wisconsin Employment Relations Board did not so hold, but the Supreme Court of the State of Wisconsin, in the opinion rendered on the motion for rehearing apparently did so hold. We say "apparently" since the decision on the motion for rehearing merely further obscured an already obscure and evasive opinion.

In such case it still rests with this Court "to enforce constitutional liberties even when denied through spurious findings of fact in a State court."

As before mentioned, the following cases confer jurisdiction upon this Court to issue a writ of certiorari to a State court where any purported non-Federal ground to support the decision is "so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent review of the decision upon the Federal question":

Leathe v. *Thomas*, 207 U. S. 93, 99;
Ohio State Bank v. *Bryan*, 282 U. S. 765, 774;
Johnson v. *Risk*, 137 U. S. 300, 307.

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and stationed on the picket line at the Plankinton House. O'Brien was arrested, convicted and fined five dollars and costs.

24. On November 14, 1939, Edward Knopf, an employe of the Plankinton House, was assaulted by John Thomas O'Maher, a picket stationed by the union at the Plankinton House, and a striking employe of the Plankinton House.

25. On November 17, 1939, Rudolph Stano, an employe of the Plankinton House, was assaulted by Joseph Hofich, a picket stationed at the Plankinton House by the union, and Hofich was arrested, convicted, and fined five dollars and costs.

26. On November 17, 1939, Thomas James, an employe of the Plankinton House, was assaulted by Larry McAllen, a picket stationed at the hotel by the union, and fined five dollars and costs.

III.

The Order Is More Comprehensive Than Necessary or Proper under the Doctrine of the Meadowmoor Case.

In the *Meadowmoor* case this Court repeatedly emphasized that the injunction therein justified itself because of the extreme case of violence therein presented to the court. The court was careful to point out that an injunction which is based upon extreme cases of violence must, nevertheless, be directed only to those activities which can reasonably be associated with violence. The court pointed out that there was no justification in the *Meadowmoor* case to anticipate that the injunction therein sustained would be put to "abnormal uses."

The court also stated that it was not proper in that case to

> "generalize the terms of an injunction derived from and directed toward violent conduct as though it were an abstract prohibition of all picketing wholly unrelated to the violence involved."

In the instant case we do have an injunction which is a complete prohibition of all picketing and of all boycotting which would include in its broad meaning all other means of communication wholly unrelated to the violence involved. The prohibition against "boycotting in any way the Plankinton House Company" is as all-inclusive and general an interdiction as could be imagined.

We have pointed out that there is now pending in the Circuit Court for Milwaukee County a proceeding in which it is sought to hold the entire labor movement of the State of Wisconsin in contempt of court because of the writing of letters and making of public statements concerning the controversy at the Plankinton House.

We have in the instant case an order which is not at all limited in any reasonable or proper manner. The order

by its very terms prohibits every conceivable type of activity which labor organizations might engage in for legitimate purposes.

Your petitioners, in arguing before the Supreme Court of the State of Wisconsin, urged that the terms "picketing" and "boycotting" were so comprehensive that your petitioners were not completely apprised of what conduct could and could not be engaged in, and, further, that the terms necessarily include action which fell within the protection of the Constitutional guarantee of free speech. In its decision the Supreme Court answered this argument by stating:

> "While it is true that the terms 'picketing' and 'boycotting' are not terms of definite legal content, they are descriptive of a process well known to the law, and when considered in connection with the other provisions of Chapters 111 and 103, Stats. 1939, the meaning of these terms becomes reasonably certain."

Here was not an attempt to circumscribe the meanings of these terms to a limited situation relating to violence, but rather a recognition of the practically unlimited scope of such terms.

We, therefore, have in the instant case a prohibition which is as broad and as comprehensive a prohibition on the right of free speech as one might possibly conceive of. Certainly if it is the *Meadowmoor* case which it is claimed will support the injunction herein, the injunction is, nevertheless, much more comprehensive than the circumstances warrant. The writing of letters by the president of the Wisconsin State Federation of Labor urging prospective customers not to patronize the hotel certainly does not bear such close and intimate relationship to the acts of violence which have previously occurred which would justify the restraint upon such exercise of the right of free speech.

Yet not only does the order by its very terms prohibit such conduct, but the Attorney General of the State of Wisconsin in contempt proceedings so insists.

It is respectfully submitted that under no circumstances, for no reason, and under no theory known to law can an order as broad as the instant one be sustained.

Conclusion.

This case presents for decision the basic issue of whether or not Section 111.06(2)(e), Statutes 1939, ON ITS FACE is unconstitutional, void, and of no effect whatsoever because it is repugnant to the Fourteenth Amendment to the Constitution of the United States.

If the determination of the validity of this section of the statutes is not to be made upon its face then the further question is presented as to whether or not the statute, together with the order based thereon and judgment enforcing the same, deprive these petitioners of life, liberty, and property without due process of law, and deny to them the equal protection of the laws.

It is respectfully submitted by the petitioners that the statute when considered alone, as well as when considered with the orders and judgment based thereon and the testimony herein, must be held to be repugnant to the Fourteenth Amendment to the Constitution of the United States, and, therefore, null and void.

Wherefore, your petitioners submit that the relief prayed for should be granted, and that the decision of the Supreme Court of the State of Wisconsin be reversed.

Respectfully submitted,

JOSEPH A. PADWAY
and
I. E. GOLDBERG,
Counsel for Petitioners.

APPENDIX "A".

HOTEL AND RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL No. 122, and Others, Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, and others, *Respondents.*

September 13, 1940—January 7, 1941.

Appeal from a judgment of the Circuit Court for Milwaukee County: Gustave G. Gehrz, Circuit Judge. Affirmed.

This action was begun on February 24, 1940, by Hotel and Restaurant Employees' International Alliance, Local No. 122, Phil L. Valley, John Alexander, and Jack Heisdorf, each individually, as business agent, organizer, and vice-president, respectively, for and as representatives of all the members of Hotel and Restaurant Employees' International Alliance, Local No. 122; International Laundry Workers, Local No. 174; Bartenders International League of America, Local No. 64; International Union Operating Engineers, Local No. 311; Milwaukee Building Trades Council, all affiliated with the American Federation of Labor, petitioners, against Wisconsin Employment Relations Board, Henry C. Fuldner, individually and as chairman of, L. E. Gooding, individually and as a member of, R. Floyd Green, individually and as a member of the Wisconsin Employment Relations Board, and Plankinton House Company, a corporation, defendants, to review the findings, orders, and decisions made by the Wisconsin Employment Relations Board in the proceeding before that Board, entitled Plankinton House Company, a Wisconsin corporation, complainant, v. Hotel and Restaurant Employees' International Alliance, Local No. 122, and others, respondents, the findings having been made by the Wisconsin Employment Relations Board, hereinafter referred to as the "Board," on February 15, 1940. The matter was heard by the court, and on May 14, 1940, the court ordered and adjudged that the findings and conclusions of the Board

complained of be in all respects sustained, confirmed, and enforced. From this judgment the petitioners appeal.

Inasmuch as only questions of law are raised upon this appeal we shall state only so much of the facts as are material to an understanding of these questions. The petitioners are certain labor unions described above together with individuals, personally and as agents and officers of said unions. The defendants are the Wisconsin Employment Relations Board and the Plankinton House Company. On the 16th day of June, 1938, the Plankinton House Company entered into a collective-bargaining contract with the unions, which contract covered wages, hours, and working conditions governing employees of the Plankinton House Company employed at the Plankinton House and the Kilbourn Hotel, and provided as a condition of such employment that all employees coming within the terms of said contract must be and remain members of one of the respective unions so long as employed by the Plankinton House Company.

It was further provided that said contract was to continue for one year ending on the 15th day of June, 1939, and for consecutive one-year renewals unless either party served notice in writing on the other party at least thirty days before the expiration of such year that such party desired to terminate the contract at the end of the contract year. There was also a provision for notice of continuance and a provision for subsequent negotiations. The unions served notice of continuance on May 15, 1939, but desired to negotiate for improved hours, wages, and working conditions. The Plankinton House Company served notice that it desired to continue the contract for another year and desired to negotiate. Negotiations between the parties failed, arbitration was had in accordance with the terms of the contract, and on October 30, 1939, the Plankinton House Company gave notice of its willingness to execute a contract in accordance with the terms of the arbitration award. On November 2, 1939, in the afternoon, the employees of the company at both the Plankinton House and Kilbourn Hotel went on strike. Prior to calling such strike the employees did not vote by secret ballot to call such strike. Immediately after the strike was called, picketing was engaged in at the three entrances to the Plankinton House. Picketing

was carried on by the members of all the unions involved, and pickets carried banners bearing the names of all petitioning unions. The business manager of the Hotel and Restaurant Employees' International Alliance, Local No. 122, notified Marquette University and the Milwaukee School of Engineering that all students working at the Plankinton House for their meals immediately discontinue such work, and that unless such students did discontinue such work the union would be forced to stop the employment of such students working at other hotels and restaurants in the city of Milwaukee which had collective bargaining contracts with Local No. 122; that ever since the strike the Plankinton House and the Kilbourn Hotel have continued to operate with new employees replacing the striking employees.

On November 4, 1939, union pickets by means of force prevented the delivery of floral decorations to the Plankinton House; that as a result of the altercation, Jack Heisdorf, vice-president of Local No. 122, and Charles McLaughlin, assistant to the secretary of Local No. 122, were arrested, convicted, and paid fines. Charles McLaughlin returned to the picket line immediately after his arrest, and on November 17, 1939, assaulted one Lester Raasch, an employee of the Plankinton House and was again arrested, convicted, and fined. Other fines were paid under similar circumstances by other striking employees and by pickets employed by the union. Convictions were had therefor.

Upon the basis of its findings of fact, the Board found as conclusions of law and made the following order:

"1. That the contractual relationship existing between the Plankinton House Company and the respondent unions was terminated by the respondent unions on the 2d day of November, 1939, by the refusal of said unions to accept the award of the board of arbitration, and their act of calling a strike at the Plankinton House and the Kilbourn Hotel.

"2. That the respondent unions are guilty of unfair labor practices by co-operating and engaging in promoting and inducing picketing and boycotting, all being overt concomitants of a strike, without first obtaining the approval of the

majority of the employees of the Plankinton House Company by a secret ballot.

"3. That all of the former employees of the Plankinton House Company who went out on strike and who remained out on strike, have been parties to an unfair labor practice by co-operating and engaging in a strike without first obtaining the approval of a majority of such employees.

"4. That the following named persons, by reason of threats and assaults made by them to and on employees of the Plankinton House or persons seeking to do business with the Plankinton House, or by misdemeanors committed by them arising out of the controversy between the respondent unions and the complainant, Plankinton House Company, are guilty of unfair labor practices: Phil L. Valley, Jack Heisdorf, Charles McLaughlin, Charles Alden, James C. O'Brien, John Thomas O'Maher, Joseph Hofich and Thomas James.

"Upon the basis of the foregoing findings of fact and conclusions of law the Board, pursuant to Section 111.07 (4) of the Wisconsin Statutes, makes the following

"ORDER.

"It is ordered that the respondent unions, Hotel and Restaurant Employees' International Alliance, Local No. 122, International Laundry Workers, Local No. 174, Bartenders International League of America, Local No. 64, International Union Operating Engineers, Local No. 311, and the Milwaukee Building Trades Council, the officers, members, agents, successors and assigns of each, shall:

"1. Immediately cease and desist from:

"(a) Engaging in promoting or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;

"(b) Attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employees of the Plankinton House Company;

"(c) Boycotting in any way the Plankinton House Company.

"2. Take the following affirmative action, which the board finds will effectuate the policies of the act:

"(a) Post notices to their members in conspicuous places at the union headquarters that the union has ceased and desisted in the manner aforesaid, and that all officers, members and agents of the union are to refrain from engaging in promoting or inducing picketing and boycotting of the Plankinton House Company, and also to refrain from attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employees of the Plankinton House Company;

"(b) Notify the board in writing forthwith that steps have been taken by each of the respondent unions to comply herewith."

With its answer to the petition to set aside and vacate the order, the board filed a petition and cross complaint asking that the court enter an order confirming and enforcing all of the provisions of its order as amended. The petition and cross complaint having been brought on for hearing, the court by its judgment sustained the findings of the Board, and a judgment was entered accordingly sustaining, confirming, and enforcing the order.

ROSENBERRY, C. J. By ch. 57, Laws of 1939, the legislature repealed ch. 111 of the statutes of 1937 and created a new chapter to be designated ch. 111. We shall state only so much of this chapter as is necessary to present the questions to be considered. The chapter provides that it may be cited as the Employment Peace Act.

Sec. 111.01, Stats. 1939, declares the public policy of the state as to unemployment relations and collective bargaining. It recognizes that there are three major interests involved, namely, that of the public, the employee, and the employer.

Sec. 111.02, Stats. 1939, defines certain terms used in the chapter:

"(5) 'Collective bargaining' is the negotiating by an employer and a majority of his employees in the collective-bargaining unit (or their representatives) concerning representation or terms and conditions of employment of such

employees in a mutually genuine effort to reach an agreement with reference to the subject under negotiation.

"(6) The term 'collective-bargaining unit' shall mean all of the employees of one employer (employed within the state), except that where a majority of such employees engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in section 111.05 (2) to constitute such group a separate bargaining unit they shall be so considered. Two or more collective-bargaining units may bargain collectively through the same representative where a majority of the employees in each separate unit shall have voted by secret ballot as provided in section 111.05 (2) so to do. * * *

"(8) The term 'labor dispute' means any controversy between an employer and the majority of his employees in a collective-bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute."

Sec. 111.06, Stats. 1939, defines what are unfair labor practices:

"(1) [Not involved here.]

"(2) It shall be an unfair labor practice for an employee individually or in concert with others: * * *

"(e) To co-operate in engaging in, promoting or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective-bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike. * * *

"(3) It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employees, or in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by subsections (1) and (2) of this section."

While the briefs on both sides contain much matter relating to the history, background, and philosophy of labor legislation, the *sole* contention made here is that sub. (2) (e), sec. 111.06, Stats. 1939, is unconstitutional and void, (1) because it contravenes the guaranties of free speech afforded by the Fourteenth amendment to the constitution of the United States and section 3 of article I of the constitution of the state of Wisconsin; (2) because it does not constitute a valid exercise of the police power of the state since it is for the vindication of a private right and not a public right; (3) because it is indefinite and uncertain because it establishes no means or standards wherein and whereby the requisite balloting can be conducted and the results thereof ascertained, and is therefore incapable of application; and (4) because the terms "picketing" and "boycotting" are vague and indefinite; their use in the statute and order is not sufficient to apprize the unions as to what conduct is or is not prohibited.

In order to determine whether the Employment Peace Act is unconstitutional, it must first be construed. Petitioners argue that under the provisions of sub. (2) (e), of the act, sec. 111.06, Stats. 1939, and the order issued by the board pursuant thereto that individual employees are forbidden as individuals to do any of the things enumerated in the subsection except in support of an authorized strike. The legislature has very carefully and explicitly set out as an aid in the construction of the act what it intended to do in its declaration of policy. In addition to that, sec. 111.15, Stats. 1939, provides:

"Except as specifically provided in this chapter, nothing therein shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work; nor shall anything in this chapter be so construed as to invade unlawfully the right to freedom of speech. And nothing in this chapter shall be so construed or applied as to deprive any employee of any unemployment benefit which he might otherwise be entitled to receive under chapter 108 of the statutes [unemployment benefits]."

The legislature also amended ch. 103, Stats., entitled "Employment Regulations," but did not amend or repeal sec. 103.53, Stats., which makes lawful the doing of certain things in labor disputes. It also redefined the term "labor dispute" as found in ch. 103, as follows:

"103.62 (3) The term 'labor dispute' means any controversy between an employer and the majority of his employees in a collective-bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute. The provisions of this subsection shall supersede any provision of the statutes in conflict therewith."

The act also established rules for determining when a case shall be held to involve or grow out of a labor dispute. The definition of "labor dispute," and the rules for determining when a case shall be held to involve or grow out of a labor dispute contained in ch. 57, Laws of 1939, are widely different in theory and purpose from like provisions to be found in the statutes of 1937, which they supplanted. Ch. 57 limits a labor dispute to a case where there is a controversy between an employer and a majority of his employees in a collective-bargaining unit. The definition contained in sec. 103.62 (3), Stats. 1937, was very much broader and much more inclusive than that contained in sec. 103.62 (3), Stats. 1939.

Upon the oral argument great stress was laid upon the fact that according to the terms of the act an employee was deprived of his constitutional right of freedom of speech. Appellants support their contention in this regard by reference to the case of *Thornhill v. Alabama* (1940), 310 U. S. 88, 60 Sup. Ct. 736, 84 L. Ed. 1093. Counsel, however, ignore the fact that the *Thornhill Case* dealt with a statute which prohibited loitering or picketing and declared picketing to be a misdemeanor. As construed by the state court it prohibited the publicizing of the facts of a labor dispute whether by printed sign, by pamphlet, by word of mouth, or otherwise. The peace act deals with

concert of action in carrying on an unauthorized strike by the usual overt acts concomitant of a strike.

The peace act, however, does not forbid picketing. It attempts to regulate it and to provide under what conditions and circumstances picketing may be carried on by striking employees. The peace act expressly provides that it shall not be so construed as to impair the right of free speech. One violating the provisions of the peace act is not guilty of a misdemeanor. His act is merely declared to be an unfair labor practice. The right to speak freely is guaranteed by the constitution, but that right, the same as other rights guaranteed by the constitution, is subject to limitations. In the exercise of that right one is not free from liability for libel, duress, or fraud, although speech was the agency in each case. *John F. Jelke Co. v. Beck* (1932), 208 Wis. 650, 242 N. W. 576; *Wisconsin Labor R. Board v. Fred Rueping L. Co.* (1938) 228 Wis. 473, 279 N. W. 673. See also *Schenck v. United States* (1919), 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470; *Gitlow v. New York* (1925), 268 U. S. 652, 45 Sup. Ct. 625, 69 L. Ed. 1138.

The act does not limit the right of an employee to speak freely. It declares co-operating in "engaging in, promoting or inducing picketing, boycotting," etc., in aid of an unauthorized strike, to be an unfair labor practice. The fact that an employee in the course of doing the designated acts may use speech as a means of carrying on his activities, does not bring the acts within the protection of the constitutional guaranties of free speech. The term "picketing," as used in sub. (2) (e), sec. 111.06, Stats. 1939, does not include acts held in the *Thornhill Case, supra*, to be within the protection of the constitutional guaranty of the right of free speech. The express language of the act forbids such a construction. It clearly refers to that kind of picketing which the *Thornhill Case* says the state has power to deal with "as a part of its power to preserve the peace, and protect the privacy, the lives and the property of its residents."

Par. (e) by its terms does not apply to an individual. An individual cannot co-operate with himself. Par. (e) does not forbid an employee to quit his employment indi-

vidually or in concert with others. It does not forbid an employee singly or in concert with others from bringing about a vote by a collective-bargaining unit as to whether there shall be a strike. By the act strikes are divided into two classes,—authorized and unauthorized. Par. (e) has no application except in the case of an unauthorized strike. It is the act of co-operating in engaging in, promoting or inducing picketing, boycotting, or other overt acts in support of an unauthorized strike that par. (e) declares to be an unfair labor practice. Nowhere in the act is it declared that engaging in, promoting, or inducing picketing, boycotting, or any other act concomitant of a strike shall be deemed to be an unlawful act. It is declared merely to be an unfair labor practice. Our attention has been called to a decision of the supreme court of the state of Oregon, *American Federation of Labor v. Bain* (Or.), 106 Pac. (2d) 544, decided October 22, 1940. The statute under consideration in that case was widely different from ch. 111, Stats. 1939. In construing this statute the supreme court of Oregon said (106 Pac. (2d) 544, 554):

"In the statute there is no definition of the word 'picket.' It is a word of 'vague contours,' as the supreme court said in the *Thornhill Case*, and doubtless may be used to indicate conduct of a noxious character with which the state has power to deal. But it also embraces activities which the supreme court holds the state may not lawfully suppress. It includes, we think, the conduct of one who walks or patrols in the vicinity of a place of business involved in a labor dispute, and by word of mouth, banner or placard, undertakes to give information to the public concerning such dispute. The conduct of such person may be peaceful or otherwise; his demeanor orderly or threatening; the information true or false. The activity may be, and usually is, incident to an organized effort to prevail in the controversy, and we concur in the view of counsel for the defendants that it was precisely picketing by a member of a labor union and on behalf of his organization that the voters had in mind when they enacted this law. But that the activities embraced by the word 'picket' were intended to include such as are free from violence, intimi-

dation and fraud,—what is ordinarily called 'peaceable picketing'—we think there can be no doubt. It follows that the very type of conduct which the supreme court held in the *Thornhill* and *Carlson Cases* to be protected by the Fourteenth amendment, is denounced by the Oregon statute unless engaged in incident to a controversy relative to wages, hours or working conditions, between an employer and a majority of his employees."

As already pointed out, the Wisconsin statute expressly provides that it shall be so construed and applied that it shall not interfere with the right of free speech. As we understand and construe the statute, the right of free speech is not interfered with. The conduct complained of in this case, and described as "picketing," was not the sort of conduct that was indulged in by the defendant in the *Thornhill Case, supra.* The conduct complained of in this case and dealt with by the board and by the court was of an entirely different character. It was mass picketing, organized and carried on by the unions supplemented by boycott and violence, and was clearly within the exception stated in the *Thornhill Case* warranting state action. In that case the supreme court of the United States said (p. 105):

"We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger."

Ch. 111, Stats. 1939, is a statute of that character. We do not understand the decisions of the United States supreme court to mean that there can be no regulation of the right of picketing. That court has not yet said that a person who goes upon the premises of another for the purpose of creating a disturbance and disorganizing the other's business, is protected in the doing of such acts by the constitutional guaranty of free speech. In this case it is undisputed that numerous assaults were committed by pickets; that the pickets acted in concert; that the fines of

these pickets were paid by the unions; that ingress and egress to and from the premises of the employer were prevented by force and arms. It was at conduct of that kind that the statute was aimed. It is conduct of that kind that is dealt with in this case. It is conduct of that kind that is declared to be an unfair labor practice by the statute, and from which the defendants are ordered to cease and desist. The statute does not even declare conduct of that kind to be unlawful, nor does it subject the offender to a criminal prosecution. In this respect it differs fundamentally from the statute that the Oregon supreme court had under consideration.

The effect of pursuing a course of conduct which under the statute amounts to an unfair labor practice is:

(1) To subject the actor to the provisions of sec. 111.07, Stats. 1939. Under it he may upon complaint be brought before the board where he may answer the complaint and appear in person or otherwise at the hearing, of which a full and complete record is required to be kept. After the final hearing the board is required promptly to make and file its findings. The board may by its final order dismiss the charges or require the person complained of to cease and desist from the unfair labor practice found to have been committed, suspend his rights of immunities, privileges, or remedies granted or afforded by the chapter for not more than a year, and require him to take such affirmative action, including reinstatement of employees with or without pay, as the board may deem proper. The determination of the board may be enforced by the judgment of the circuit court.

(2) When a person is found guilty of an unfair labor practice he loses the benefit of sec. 103.53, Stats. 1939, which prescribes what acts, whether performed singly or in concert, shall be legal in the conduct of a labor dispute. He is thereby remitted to his rights under the constitution, other statutes, and the common law. This is recognized in sec. 111.07 (1), which provides, in part:

"Nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction."

This exception, of course, applies to the employee, employer, or any person connected with a particular controversy as described in sec. 111.06 (3), Stats. 1939.

(3) An employee who is guilty of an unfair labor practice may lose his status as an "employee" as defined in sec. 111.02 (3), Stats. 1939.

No rights of a person guilty of an unfair labor practice are invaded until there has been a final determination by the board. The statute is not self-executing. It merely provides the machinery by which certain described labor practices may, after due hearing, be held to be unfair, and the person complained of ordered to cease and desist therefrom. Nothing in the act prevents or was intended to prevent employees from making such demands upon their employer as they think the circumstances warrant. Whether such employees act singly or in concert they are within their rights in making such demands upon their employer. We find nothing in the act which prevents a minority of a collective-bargaining unit from withdrawing from employment either singly or in concert. They are not guilty of an unfair labor practice in so doing. But if they attempt to coerce their employer by concerted picketing, a boycott, or by any other similar overt act concomitant of a strike, they will be guilty of an unfair labor practice as defined in the act. We say similar overt act because the maximum of *ejusdem generis* applies. *Chicago & N. W. R. Co. v. Railroad Comm.* (1916) 162 Wis. 91, 155 N. W. 941.

The petitioners complain that the characterization of the acts of employees as unfair labor practices cannot be made to depend on the action of a majority of a collective-bargaining unit; that the legislature cannot place it within the power of a majority of the collective-bargaining unit to authorize a strike. This argument is an attack upon a principle which is fundamental in the attempt of the legislature and of congress to regulate labor relations. The principle upon which authorized collective bargaining depends is that the rule of the majority within an appropriate collective-bargaining unit shall bind the minority. We see no way by which the principle of collective bargaining can be maintained unless this right of a majority of a collective-

bargaining unit to speak for the unit including the minority is maintained. A bargain on behalf of a collective-bargaining unit amounts to nothing, if after it is made the individuals or some of them comprising that unit are not affected thereby. This principle is explicit in the National Labor Relations Act, in the Railway Labor Peace Act, and in the act now under consideration. If the majority of a collective-bargaining unit can thus coerce the minority in the matter of bargaining, we see no reason why the legislature may not vest in a majority of the unit power to determine whether such conditions obtain in the employment as warrant the calling of a strike in an effort to remedy them. There is no more delegation of legislative power in the one case than there is in the other. It is in most cases the same majority that made the bargain for the unit that determines whether a strike shall be called. We see in this no delegation of legislative power. Whether the conditions are such in the employment as justify the employees in striking is a matter more particularly within the knowledge of the employees than anyone else, and is in the last analysis merely a question of fact. A vote of the majority of the employees in a collective-bargaining unit to strike is a determination that facts exist which justify it. When such a determination is made, sub. (2) (e), sec. 111.06, Stats. 1939, does not apply. The method of determining when a strike is justifiable is almost identical with the method provided for the submission to a municipality of whether a particular law shall be effective within that municipality. The electors determine upon the basis of their own knowledge whether conditions are such as to make the operation of the law within the municipality desirable and conducive to the general welfare. That also is a question of fact. When a majority have voted to call a strike, the means and methods of coercion which they may employ are not unlimited or unrestricted. Less than a majority may strike, but they will be under the restrictions of the statutes as to the methods of coercion which they may use. Sec. 103.53 specifies with particularity what may be considered legal in the conduct of a labor dispute. These enumerated means striking employees not guilty of an unfair labor practice

are at liberty to employ. Any court or judge is forbidden to restrain the doing of such acts when done in connection with a labor dispute. The sole difference between coercive acts in support of a strike which has been called by a majority of members of a collective-bargaining unit and one which has not been so called is that the members of a minority group do not have the benefit of sec. 103.53, that is, by indulging in an unauthorized strike they lose their privileges under that section and are subject to the provisions of ch. 111, Stats. 1939, relating to unfair labor practices. The character of their coercive acts must then be determined either by submitting the controversy to the board or by "the pursuit of legal or equitable remedies in courts of competent jurisdiction." If one merely withdraws from his employment he is not subject to the act.

On behalf of the appellants fear is expressed that a—

"servile, docile or moribund majority refuses to place its stamp of approval, to grant a license, to the carrying on of peaceful, truthful appeals to the public."

This argument seems to disregard the fact that the question of whether intolerable working conditions, oppressive wages, or killing hours need correction is submitted to a majority of the group which must be suffering under these same conditions, the majority cannot by their action impose anything upon a minority that they do not by the same action impose upon themselves.

There is nothing in the history of the labor movement to warrant any fear that labor will be servile, docile, or moribund. On the contrary, no group within the body politic has shown itself more willing to stand upon its rights and sacrifice present advantage for future benefits than has labor.

The petitioners further contend that the cease-and-desist order is too broad; that even though the petitioners have been found guilty of unlawful labor practices in the conduct of their unauthorized strike, that all picketing and boycotting cannot be forbidden by the board, and cite as authority for their contention, *May's Furs & Ready-To-Wear, Inc., v. Bauer* (1940), 282 N. Y. 331, 26 N. E. (2d) 279.

The proceeding in the *May's* v. *Bauer Case* was one for injunctive relief. This contention is based on the assumption that the rules which apply to a court in granting injunctive relief apply in the hearing before the board. In the *May's Case*, the employer sought an injunction in a court of equity. The court said (p. 337):

"Upon this appeal there is involved the scope and application of a legislative enactment whose wisdom or lack of wisdom is not a consideration open to judicial inquiry. Subject only to constitutional restrictions, it is the duty of this court to apply the statute as enacted by the legislature."

The question decided was that the statutes of the state of New York, providing that the court should not issue injunctions in a case growing out of a labor dispute except in accordance with the provisions of the statute, were controlling; that under the statute the court could not enjoin lawful acts committed in support of a strike. We have a similar statute in Wisconsin (sec. 103.56), but by sec. 111.17, Stats. 1939, it is provided that the provisions of ch. 111, Stats. 1939, shall prevail wherever they conflict with the provisions of other statutes. This court is under the same duty to declare the law in accordance with the provisions of ch. 111 that the court of the state of New York was under to declare the law in respect to injunctions in labor disputes and for the same reasons.

It is argued that the terms "picketing" and "boycotting" are so vague, indefinite, and uncertain as to render sub. (2) (e), sec. 111.06, Stats. 1939, void. In support of that argument cases relating to the construction of statutes defining criminal offenses are cited. Ch. 111, Stats. 1939, creates no criminal offenses. Violation of any of its terms does not subject the actor to criminal prosecution. The board is charged with the duty of enforcing the act. The power of the board relating to enforcement does not arise until some party in interest has filed a complaint in writing.

There can be no question but that the purpose of the legislature in enacting ch. 111, Stats. 1939, was widely different from the purpose which actuated it in the enactment of

ch. 111, Stats. 1937, which was repealed. It appears from the briefs that much complaint was made because ch. 111, Stats. 1937, made no provision with respect to unfair labor practices by employers. In providing for "industrial peace, regular and adequate income for the employee, and uninterrupted production of goods and services" (sec. 111.01 (2), Stats. 1939), we see no reason why the legislature may not forbid concerted picketing and boycotting in aid of an unauthorized strike. Under sec. 103.51 *et seq.*, Stats. 1937, it was held that the plant of an employer might be picketed although there was no dispute between him and his employees and the employer employed no members of the union. *American Furn. Co. v. I. B. of T. C. & H. of A.* (1936) 222 Wis. 338, 268 N. W. 250. Under the same statute it was held that a labor union might conduct picketing operations for the purpose of coercing an employer to desist from performing work in his own business and in connection with projects undertaken by him. *Senn v. Tile Layers Protective Union* (1936), 222 Wis. 383, 268 N. W. 270, 268 N. W. 872. It is apparent that the legislature was of the view that too wide a latitude was given to employees in their attempts to coerce their employers. All these questions relating to rights of employees to organize, conduct strikes, boycotts, and other coercive measures are in the field of public policy. As the court of appeals of New York said in the case already cited, and as this court has said many, many times, these questions are for the legislature. Courts do not sit to pass upon the wisdom or unwisdom of the acts of the legislature. In order to preserve order and prevent breaches of the peace, and assure to all citizens their lawful rights, the legislature may well forbid the doing of acts which under other circumstances would be lawful. The acts committed by the petitioners, as shown by the findings in this case, would have justified injunctive relief under the common law or any labor-relations statute, either state or federal.

While in the absence of legislation it was necessary for the court to declare public policy in controversies relating to labor relations, when the legislature acts within the constitutional limits of its power, its mandates supersede court

decisions and control as to future controversies. Both parties to a labor dispute are under the same constitution and both are subject to the valid acts of the legislature. Just where the line should be drawn in an effort to balance the bargaining power of the parties is primarily a matter of public policy for the legislature and not a question of law for the courts.

We discover no invasion of the right of freedom of speech either in sub. (2) (e), sec. 111.06, Stats. 1939, or in the way the law was administered by the board in this case. The right of the individual to freedom of speech is by the terms of the act left unimpaired. It is the right to concert of action that is regulated. Nor do we discover any such uncertainty or indefiniteness in the law as to render it invalid. While it is true that the terms "picketing" and "boycotting" are not terms of definite legal content, they are descriptive of a process well known to the law, and when considered in connection with the other provisions of chs. 111 and 103, Stats. 1939, the meaning of these terms becomes reasonably certain.

The statute is one providing for the regulation and protection of civil rights, and therefore does not partake of the nature of a criminal statute. By engaging in an unauthorized strike an employee loses his status as an employee. He then has the same rights and is subject to the same liabilities as a third person. When he thus withdraws from his employment he is free to speak, but his right to coerce his former employer is limited by the act. Except as his acts affect the employer he is under no restraint. It is true that the act limits the use of coercive measures as they have ordinarily been used in labor disputes, but that is a matter for the legislature. It is not within the province of the court to pass upon the wisdom or unwisdom of the public policy declared by the legislature.

Since we interpret the order of the board to be coextensive with the statute as construed, we find it unnecessary to modify the order or judgment.

By the Court.—Judgment affirmed.

The following opinion was filed January 7, 1941:

ROSENBERRY, C. J. (*on motion for rehearing*). On this motion appellants open their argument with the following statement:

"Since receipt of the supreme court's decision we have gone over it carefully and searchingly in order that we might have a clear and precise understanding of the basis for such decision.

"Only one thing was clear. That was that the Wisconsin supreme court, traditionally liberal and traditionally alert to protect the civil liberties of the citizens of this state, had placed its stamp of approval upon a statute, and an order based thereon, prohibiting minority groups from engaging in those rights guaranteed by the constitution of the United States. This for the sole reason that they were minority groups."

What counsel refer to is their claim that the act which provides that what is denominated in the opinion "an unauthorized strike," that is, one not made pursuant to a majority vote of employees, is an unfair labor practice, deprives the minority group of a constitutional right to strike and infringes the right of free speech. It is almost futile to attempt to reply to a contention of this kind in the face of the provisions of the statute and the explicit language of the opinion. Counsel continue to misinterpret the statute and, as a consequence, misunderstand the opinion.

Section 111.15 of the Employment Peace Act provides, among other things:

"Except as specifically provided in this chapter, nothing therein shall be construed so as to *interfere with or impede* or *or diminish in any way the right to strike* . . .; nor shall anything in this chapter be so construed as to *invade unlawfully the right to freedom of speech.*"

The last sentence contained in the opinion is

"Since we interpret the order of the board to be coextensive with the statute as construed, we find it unnecessary to modify the order or judgment."

It is explicitly stated in the opinion that the order of the board, the judgment of the circuit court affirming it, and the opinion of this court did not deal with anything approaching peaceful picketing. We pointed out—

"In this case it is undisputed that numerous assaults were committed by pickets; that the pickets acted in concert; that the fines of these pickets were paid by the unions; that ingress and egress to and from the premises of the employer were prevented by force and arms. It was at conduct of that kind that the statute was aimed. It is conduct of that kind that is dealt with in this case. It is conduct of that kind that is declared to be an unfair labor practice by the statute, and from which the defendants are ordered to cease and desist. The statute does not even declare conduct of that kind to be unlawful, nor does it subject the offender to a criminal prosecution."

How this can be tortured into a statement that minority groups are, by the order affirmed in this case, prohibited from peaceful picketing as described in the *Thornhill case*, is beyond our understanding. Under the statute and the order of the board as interpreted and construed by the explicit language of the opinion, freedom of speech and the right peacefully to picket is in no way interfered with. The appellants could not be ordered to cease and desist from something they were not engaged in.

We did not deal with every provision contained in the Employment Peace Act for the reason, as stated in the opinion, upon this appeal sec. 111.06 (2) (e), Stats. 1939, was the only section of the statute drawn in question and it is with the construction of that section that we deal and it is explicitly so stated in the opinion. We did not attempt, because it was not involved in this case, to distinguish between what a majority group may do in carrying on a strike from what the minority group may do. We pointed out that the statute nowhere prohibited employees from withdrawing from their employment either singly or in groups and certainly it in no way interferes with the right of free speech. Par. (e), as construed, does not prohibit, as described in the *Thornhill case*, peaceful picketing. We may

say this, however, that the statute does not authorize the majority group, even though it has voted to strike, to commit acts of violence, to take possession of the employer's property and forcibly to prevent ingress and egress to and from the premises.

The appellant employees, unions, and officers are not in a position in this case to raise any question respecting the right peacefully to picket or the right of free speech. The picketing carried on in this case was not peaceful and the right of free speech is in no way infringed by the statute or the order of the board.

This court does not seek applause on the ground that it is progressive and liberal, or indeed, upon any other ground. The court has, however, a duty, fairly and impartially to apply and interpret the law in all cases where the rights of citizens are involved to the end that their rights under the constitution and the law may be preserved to them inviolate. This duty it strives to discharge with fidelity to the law and the constitution. As we said in *American Furn. Co. I. B. of T. C. & H. of A., etc.* (1936), 222 Wis. 338, 365, 268 N. W. 250, 106 A. L. R. 335:

"We conclude that the act as we construe it . . . is a valid exercise of legislative power. . . . Whether such laws constitute a wise solution may, of course, be fairly put in question, but the forum for such a controversy is the legislature and not the courts. The question is irrelevant here, and we cannot resist the conclusion that one of the purposes of the labor code was to make it so and to substitute a legislative declaration of policy for the varying standards and views theretofore expressed in judicial opinions."

By the Court.—Motion denied with $25.00 costs.

APPENDIX "B."

WISCONSIN STATUTES

Chapter 111

EMPLOYMENT RELATIONS

(Enacted in 1939)

111.01 Declaration of policy. The public policy of the state as to employment relations and collective bargaining, in the furtherance of which this chapter is enacted, is declared to be as follows:

(1) It recognizes that there are three major interests involved, namely: That of the public, the employe, and the employer. These three interests are to a considerable extent interrelated. It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of the others.

(2) Industrial peace, regular and adequate income for the employe, and uninterrupted production of goods and services are promotive of all of these interests. They are largely dependent upon the maintenance of fair, friendly and mutually satisfactory employment relations and the availability of suitable machinery for the peaceful adjustment of whatever controversies may arise. It is recognized that certain employers, including farmers and farmer cooperatives, in addition to their general employer problems, face special problems arising from perishable commodities and seasonal production which require adequate consideration.

It is also recognized that whatever may be the rights of disputants with respect to each other in any controversy regarding employment relations, they should not be permitted, in the conduct of their controversy, to intrude directly into the primary rights of third parties to earn a livelihood, transact business and engage in the ordinary affairs of life by any lawful means and free from molestation, interference, restraint or coercion.

(3) Negotiation of terms and conditions of work should result from voluntary agreement between employer and em-

ployé. For the purpose of such negotiation an employe has the right, if he desires, to associate with others in organizing and bargaining collectively through representatives of his own choosing, without intimidation or coercion from any source.

(4) It is the policy of the state, in order to preserve and promote the interests of the public, the employe, and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated.

While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat.

111.02 Definitions. When used in this chapter:

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, or receivers.

(2) The term "employer" means a person who engages the services of an employe, and includes any person acting on behalf of an employer within the scope of his authority, express or implied, but shall not include the state or any political subdivision thereof, or any labor organization or anyone acting in behalf of such organization other than when it is acting as an employer in fact.

(3) The term "employe" shall include any person, other than an independent contractor, working for another for hire in the state of Wisconsin in a non-executive or non-supervisory capacity, and shall not be limited to the employes of a particular employer unless the context clearly indicates otherwise; and shall include any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute or because of any unfair labor practice on the part of an employer and (a) who has not refused or failed to return to work upon the final disposition of a labor dispute or a charge of an unfair labor practice by a tribunal having competent jurisdiction of the same or whose jurisdiction was accepted by the employe or his representative, (b) who has not been found to have committed or to have been a party to any unfair labor practice hereunder, (c) who has not obtained regular and substantially

equivalent employment elsewhere, or (d) who has not been absent from his employment for a substantial period of time during which reasonable expectancy of settlement has ceased (except by an employer's unlawful refusal to bargain) and whose place has been filled by another engaged in the regular manner for an indefinite or protracted period and not merely for the duration of a strike or lockout; but shall not include any individual employed in the domestic service of a family or person at his home or any individual employed by his parent or spouse or any employe who is subject to the federal railway labor act.

(4) The term "representative" includes any person chosen by an employe to represent him.

(5) "Collective bargaining" is the negotiating by an employer and a majority of his employes in a collective bargaining unit (or their representatives) concerning representation or terms and conditions of employment of such employes in a mutually genuine effort to reach an agreement with reference to the subject under negotiation.

(6) The term "collective bargaining unit" shall mean all of the employes of one employer (employed within the state), except that where a majority of such employes engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in section 111.05 (2) to constitute such group a separate bargaining unit they shall be so considered. Two or more collective bargaining units may bargain collectively through the same representative where a majority of the employes in each separate unit shall have voted by secret ballot as provided in section 111.05 (2) so to do.

(7) The term "unfair labor practice" means any unfair labor practice as defined in section 111.06.

(8) The term "labor dispute" means any controversy between an employer and the majority of his employes in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute.

(9) The term "all-union agreement" shall mean an agreement between an employer and the representative of his

employes in a collective bargaining unit whereby all of the employes in such unit are required to be members of a single labor organization.

(10) The term "board" means the Wisconsin employment relations board, as created by section 111.03.

(11) The term "election" shall mean a proceeding in which the employes in a collective bargaining unit cast a secret ballot for collective bargaining representatives or for any other purpose specified in this chapter and shall include elections conducted by the board, or, unless the context clearly indicates otherwise, by any tribunal having competent jurisdiction or whose jurisdiction was accepted by the parties.

(12) The term "secondary boycott" shall include combining or conspiring to cause or threaten to cause injury to one with whom no labor dispute exists, whether by (a) withholding patronage, labor, or other beneficial business intercourse, (b) picketing, (c) refusing to handle, install, use or work on particular materials, equipment or supplies, or (d) by any other unlawful means, in order to bring him against his will into a concerted plan to coerce or inflict damage upon another.

111.03 Employment relations board. There is hereby created a board to be known as Wisconsin employment relations board, which shall be composed of three members, who shall be appointed by the governor by and with the consent of the senate. No appointee at the time of the creation of the board shall serve on said board without first having been confirmed by the senate. The term of office of the members first to be appointed shall be two, four and six years respectively, but their successors shall be appointed for terms of six years each, except that any individual appointed to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The governor shall designate one member to serve as chairman of the board. Each member of the board shall take and file the official oath. A vacancy in the board shall not impair the right of the remaining members to exercise all the powers of the board and two members of the board shall constitute a quorum. The board shall have a seal for the authentication of its orders and proceedings, upon which shall be inscribed

the words "WISCONSIN EMPLOYMENT RELATIONS BOARD—Seal". Each member of the board shall be eligible for reappointment and shall not engage in any other business, vocation, or employment. The board may employ, promote and remove a secretary, deputies, clerks, stenographers and other assistants, and examiners, fix their compensation and assign them to their duties, consistent with the provisions of this chapter. The board shall maintain its office at Madison and shall be provided by the director of purchases with suitable rooms, necessary furniture, stationery, books, periodicals, maps and other necessary supplies. The board may hold sessions at any place within the state when the convenience of the board and the parties so requires. At the close of each fiscal year the board shall make a written report to the governor of such facts as it may deem essential to describe its activities, including the cases it has heard, its disposition of the same, and the names, duties and salaries of its officers and employes. A single member of the board is hereinafter in this chapter referred to as a commissioner.

111.04 Rights of employes. Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities.

111.05 Representatives and elections. (1) Representatives chosen for the purposes of collective bargaining by a majority of the employes voting in a collective bargaining unit shall be the exclusive representatives of all of the employes in such unit for the purposes of collective bargaining, provided that any individual employe or any minority group of employes in any collective bargaining unit shall have the right at any time to present grievances to their employer in person or through representatives of their own choosing, and the employer shall confer with them in relation thereto.

(2) Whenever a question arises concerning the determination of a collective bargaining unit as defined in section

111.02 (6), it shall be determined by secret ballot, and the board, upon request, shall cause the ballot to be taken in such manner as to show separately the wishes of the employes in any craft, division, department or plant as to the determination of the collective bargaining unit.

(3) Whenever a question arises concerning the representation of employes in a collective bargaining unit the board shall determine the representatives thereof by taking a secret ballot of employes and certifying in writing the results thereof to the interested parties and to their employer or employers. There shall be included on any ballot for the election of representatives the names of all persons submitted by an employe or group of employes participating in the election, except that the board may, in its discretion, exclude from the ballot one who, at the time of the election, stands deprived of his rights under this chapter by reason of a prior adjudication of his having engaged in an unfair labor practice. The ballot shall be so prepared as to permit of a vote against representation by anyone named on the ballot. The board's certification of the results of any election shall be conclusive as to the findings included therein unless reviewed in the same manner as provided by subsection (8) of section 111.07 for review of orders of the board.

(4) Questions concerning the determination of collective bargaining units or representation of employes may be raised by petition of any employe or his employer (or the representative of either of them). Where it appears by the petition that any emergency exists requiring prompt action, the board shall act upon said petition forthwith and hold the election requested within such time as will meet the requirements of the emergency presented. The fact that one election has been held shall not prevent the holding of another election among the same group of employes, provided that if appears to the board that sufficient reason therefor exists.

111.06 What are unfair labor practices. (1) It shall be an unfair labor practice for an employer individually or in concert with others:

(a) To interfere with, restrain or coerce his employes in the exercise of the rights guaranteed in section 111.04.

(b) To initiate, create, dominate or interfere with the formation or administration of any labor organization or contribute financial support to it, provided that an employer shall not be prohibited from reimbursing employes at their prevailing wage rate for time spent conferring with him, nor from cooperating with representatives of at least a majority of his employes in a collective bargaining unit, at their request, by permitting employe organizational activities on company premises or the use of company facilities where such activities or use create no additional expense to the company.

(c) To encourage or discourage membership in any labor organization, employe agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment; provided, that an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employes in a collective bargaining unit, where three-quarters or more of the employes in such collective bargaining unit shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the board. The board shall declare any such all-union agreement terminated whenever it finds that the labor organization involved has unreasonably refused to receive as a member any employe of such employer, and each such all-union agreement shall be made subject to this duty of the board. Any person interested may come before the board as provided in section 111.07 and ask the performance of this duty.

(d) To refuse to bargain collectively with the representative of a majority of his employes in any collective bargaining unit; provided, however, that where an employer files with the board a petition requesting a determination as to majority representation, he shall not be deemed to have refused to bargain until an election has been held and the result thereof has been certified to him by the board.

(e) To bargain collectively with the representatives of less than a majority of his employes in a collective bargaining unit, or to enter into an all-union agreement except in the manner provided in subsection (1) (c) of this section.

(f) To violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award).

(g) To refuse or fail to recognize or accept as conclusive of any issue in any controversy as to employment relations the final determination (after appeal, if any) of any tribunal having competent jurisdiction of the same or whose jurisdiction the employer accepted.

(h) To discharge or otherwise discriminate against an employe because he has filed charges or given information or testimony in good faith under the provisions of this chapter.

(i) To deduct labor organization dues or assessments from an employe's earnings, unless the employer has been presented with an individual order therefor, signed by the employe personally, and terminable at the end of any year of its life by the employe giving at least thirty day's written notice of such termination.

(j) To employ any person to spy upon employes or their representatives respecting their exercise of any right created or approved by this chapter.

(k) To make, circulate or cause to be circulated a blacklist as described in section 343.682.

(l) To commit any crime or misdemeanor in connection with any controversy as to employment relations.

(2) It shall be an unfair labor practice for an employe individually or in concert with others:

(a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employe or his family.

(b) To coerce, intimidate or induce any employer to interfere with any of his employes in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employes which would constitute an unfair labor practice if undertaken by him on his own initiative.

(e) To violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award).

(d) To refuse or fail to recognize or accept as conclusive of any issue in any controversy as to employment relations the final determination (after appeal, if any) of any tribunal having competent jurisdiction of the same or whose jurisdiction the employes or their representatives accepted.

(e) To cooperate in engaging in, promoting or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employes of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.

(f) To hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance.

(g) To engage in a secondary boycott; or to hinder or prevent, by threats, intimidation, force, coercion or sabotage, the obtaining, use or disposition of materials, equipment or services; or to combine or conspire to hinder or prevent, by any means whatsoever, the obtaining, use or disposition of materials, equipment or services, provided, however, that nothing herein shall prevent sympathetic strikes in support of those in similar occupations working for other employers in the same craft.

(h) To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike.

(i) To fail to give the notice of intention to strike provided in section 111.11.

(j) To commit any crime or misdemeanor in connection with any controversy as to employment relations.

(3) It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employes, or in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by subsections (1) and (2) of this section.

111.07 Prevention of unfair labor practices. (1) Any controversy concerning unfair labor practices may be submitted to the board in the manner and with the effect provided in this chapter, but nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction.

(2) Upon the filing with the board by any party in interest of a complaint in writing, on a form provided by the board, charging any person with having engaged in any specific unfair labor practice, it shall mail a copy of such complaint to all other parties in interest. Any other person claiming interest in the dispute or controversy, as an employer, an employe, or their representative, shall be made a party upon application. The board may bring in additional parties by service of a copy of the complaint. Only one such complaint shall issue against a person with respect to a single controversy, but any such complaint may be amended in the discretion of the board at any time prior to the issuance of a final order based thereon. The person or persons so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the notice of hearing. The board shall fix a time for the hearing on such complaint, which will be not less than ten nor more than forty days after the filing of such complaint, and notice shall be given to each party interested by service on him personally or by mailing a copy thereof to him at his last known post office address at least ten days before such hearing. In case a party in interest is located without the state and has no known post office address within this state, a copy of the complaint and copies of all notices shall be filed in the office of the secretary of state and shall also be sent by registered mail to the last known post office address of such party. Such filing and mailing shall constitute sufficient service with the same force and effect as if

served upon the party located within this state. Such hearing may be adjourned from time to time in the discretion of the board and hearings may be held at such places as the board shall designate.

The board shall have the power to issue subpoenas and administer oaths. Depositions may be taken in the manner prescribed by section 101.21. No perso shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpoena of the board on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture under the laws of the state of Wisconsin; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, before the board in obedience to a subpoena issued by it; provided, that an individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

Any person who shall wilfully and unlawfully fail or neglect to appear or testify or to produce books, papers and records as required, shall, upon application to a circuit court, be ordered to appear before the board, there to testify or produce evidence if so ordered, and failure to obey such order of the court may be punished by the court as a contempt thereof.

Each witness who shall appear before the board by its order or subpoena shall receive for his attendance the fees and mileage provided for witnesses in civil cases in courts of record, which shall be audited and paid by the state in the same manner as other expenses are audited and paid, upon the presentation of properly verified vouchers approved by the chairman of the board and charged to the proper appropriation for the board.

(3) A full and complete record shall be kept of all proceedings had before the board, and all testimony and proceedings shall be taken down by the reporter appointed by the board. Any such proceedings shall be governed by the rules of evidence prevailing in courts of equity and the

party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence.

(4) After the final hearing the board shall promptly make and file its findings of fact upon all of the issues involved in the controversy, and its order, which shall state its determination as to the rights of the parties. Pending the final determination by it of any controversy before it the board may, after hearing make interlocutory findings and orders which may be enforced in the same manner as final orders. Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend his rights, immunities, privileges or remedies granted or afforded by this chapter for not more than one year, and require him to take such affirmative action, including reinstatement of employes with or without pay, as the board may deem proper. Any order may further require such person to make reports from time to time showing the extent to which it has complied with the order.

(5) The board may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the board as a body to review the findings or order. If no petition is filed within twenty days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the board as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the board shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within ten days after the filing of such petition with the board, the board shall either affirm, reverse, set aside or modify such

findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the board is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another twenty days for filing a petition with the board.

(6). The board shall have the power to remove or transfer the proceedings pending before a commissioner or examiner. It may also, on its own motion, set aside, modify or change any order, findings or award (whether made by an individual commissioner, an examiner, or by the board as a body) at any time within twenty days from the date thereof if it shall discover any mistake therein, or upon the grounds of newly discovered evidence.

(7) If any person fails or neglects to obey an order of the board while the same is in effect the board may petition the circuit court of the county wherein such person resides or usually transacts business for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court its record in the proceedings, including all documents and papers on file in the matter, the pleadings and testimony upon which such order was entered, and the findings and order of the board. Upon such filing the board shall cause notice thereof to be served upon such person by mailing a copy to his last known post office address, and thereupon the court shall have jurisdiction of the proceedings and of the question determined therein. Said action may thereupon be brought on for hearing before said court upon such record by the board serving ten days written notice upon the respondent; subject, however, to provisions of law for a change of the place of trial or the calling in of another judge. Upon such hearing the court may confirm, modify, or set aside the order of the board and enter an appropriate decree. No objection that has not been urged before the board shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of fact made by the board, if supported by credible and competent evidence in the record, shall be con-

clusive. The court may, in its discretion, grant leave to adduce additional evidence where such evidence appears to be material and reasonable cause is shown for failure to have adduced such evidence in the hearing before the board. The board may modify its findings as to facts, or make new findings by reason of such additional evidence, and it shall file such modified or new findings with the same effect as its original findings and shall file its recommendations, if any, for the modification or setting aside of its original order.

The court's judgment and decree shall be final except that the same shall be subject to review by the supreme court in the same manner as provided in section 102.25.

(8) Within thirty days from the date of the order of the board as a body any party aggrieved thereby may petition the circuit court for the county in which he or any party resides or transacts business for review of the same; subject, however, to provisions of law for a change of the place of trial or the calling in of another judge. Where different parties in the same proceeding file petitions for review in two or more courts having proper jurisdiction, the jurisdiction of the court first petitioned shall be exclusive and the other petitions shall be transferred to it. Such petition shall state the grounds upon which a review is sought, and shall be served with the summons. Service upon the secretary of the board or any member of the board shall be deemed completed service on all parties; but there shall be left with the person so served as many copies of the summons and complaint as there are respondents, and the board shall mail one such copy to each respondent. If the circuit court is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of the findings or order, it may extend the time another thirty days in which such action may be commenced. The board shall thereupon file in the said court its record in the proceedings, as provided in the next preceding subsection. Such return of the board, when filed in the office of the clerk of the circuit court, shall constitute a judgment roll in such action, and it shall not be necessary to settle a bill of exceptions in order to make such return part of the record of such court

in such action. Said action may thereupon be brought on for hearing before said court upon such record by either party on ten days' written notice to the other. Upon such hearing the court may confirm, modify or set aside the order of the board and enter an appropriate decree. Except as specifically provided otherwise herein the proceedings shall be the same as provided for in subsection (7) of this section.

(9). In any proceedings for review of an order of the board the court shall disregard any irregularity or error unless it be made to appear affirmatively that the complaining party was prejudiced thereby.

(10) Commencement of proceedings under subsections (7) or (8) of this section shall, unless otherwise specifically ordered by the court, operate as a stay of the board's order.

(11) Petitions filed under this section shall have preference over any civil cause of a different nature pending in the circuit court, shall be heard expeditiously, and the circuit courts shall always be deemed open for the trial thereof.

(12) A substantial compliance with the procedure of this chapter shall be sufficient to give effect to the orders of the board, and they shall not be declared inoperative, illegal, or void for any omission of a technical nature in respect thereto.

(13) A transcribed copy of the evidence and proceedings or any part thereof on any hearing taken by the stenographer appointed by the board, being certified by such stenographer to be a true and correct transcript, carefully compared by him with his original notes, and to be a correct statement of such evidence and proceedings, shall be received in evidence with the same effect as if such reporter were present and testified to the fact so certified. A copy of such transcript shall be furnished on demand free of cost to any party (all of the members of a single organization being considered a single party).

(14) The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged.

111.08 Financial reports to employes. Every person acting as the representative of employes for collective bargaining shall keep an adequate record of its financial trasactions and shall present annually to each member within sixty days after the end of its fiscal year a detailed written financial report thereof in the form of a balance sheet and an operating statement. In the event of failure of compliance with this section, any member may petition the board for an order compelling such compliance. An order of the board on such petition shall be enforcible in the same manner as other orders of the board under this chapter.

111.09 Board shall make rules, regulations and orders. The board may adopt reasonable and proper rules and regulations relative to the exercise of its powers and authority and proper rules to govern its proceedings and to regulate the conduct of all elections and hearings. Such rules and regulations shall not be effective until ten days after their publication in the official state paper.

111.10 Arbitration. Parties to a labor dispute may agree in writing to have the board act or name arbitrators in all or any part of such dispute, and thereupon the board shall have the power so to act. The board shall appoint as arbitrators only competent, impartial and disinterested persons. Proceedings in any such arbitration shall be as provided in chapter 298 of the statutes.

111.11 Mediation. The board shall have power to appoint any competent, impartial, disinterested person to act as mediator in any labor dispute either upon its own initiative or upon the request of one of the parties to the dispute. It shall be the function of such mediator to bring the parties together voluntarily under such favorable auspices as will tend to effectuate settlement of the dispute, but neither the mediator nor the board shall have any power of compulsion in mediation proceedings. The board shall provide necessary expenses for such mediators as it may appoint, order reasonable compensation not exceeding ten dollars per day for each such mediator, and prescribe reasonable rules of procedure for such mediators.

Where the exercise of the right to strike by employes of

any employer engaged in the state of Wisconsin in the production, harvesting or initial processing (the latter after leaving the farm) of any farm or dairy product produced in this state would tend to cause the destruction or serious deterioration of such product, the employes shall give to the board at least ten days notice of their intention to strike and the board shall immediately notify the employer of the receipt of such notice. Upon receipt of such notice, the board shall take immediate steps to effect mediation, if possible. In the event of the failure of the efforts to mediate, the board shall endeavor to induce the parties to arbitrate the controversy.

111.12 Duties of the attorney-general and district attorneys. Upon the request of the board, the attorney-general or the district attorney of the county in which a proceeding is brought before the circuit court for the purpose of enforcing or reviewing an order of the board shall appear and act as counsel for the board in such proceeding and in any proceeding to review the action of the circuit court affirming, modifying or reversing such order.

111.13 Employer and employe committees. The board may, from time to time, appoint joint standing or special committees composed in equal numbers of representatives of employes and employers. The board may refer to any such committees for its study and advice any matters having to do with the relations of employers and employes or the operation of this chapter.

111.14 Penalty. Any person who shall wilfully assault, resist, prevent, impede or interfere with any member of the board or any of its agents or agencies in the performance of duties pursuant to this chapter shall be punished by a fine of not more than five hundred dollars or by imprisonment in the county jail for not more than one year, or both.

111.15 Construction of this chapter. Except as specifically provided in this chapter, nothing therein shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work; nor shall anything in this chapter be so construed as to in-

vade unlawfully the right to freedom of speech. And nothing in this chapter shall be so construed or applied as to deprive any employe of any unemployment benefit which he might otherwise be entitled to receive under chapter 108 of the statutes.

111.16 Existing contracts unaffected. Nothing in this chapter shall operate to abrogate, annul, or modify any valid agreement respecting employment relations existing on the effective date hereof.

111.17 Conflict of provisions; effect. Wherever the application of the provisions of other statutes or laws conflict with the application of the provisions of this chapter this chapter shall prevail, provided that in any situation where the provisions of this chapter cannot be validly enforced the provisions of such other statutes or laws shall apply.

111.18 Separability of provisions. If any provision of this chapter or the application of such provision to any person or circumstances shall be held invalid the remainder of this chapter or the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

111.19 Title of chapter. This chapter may be cited as the "Employment Peace Act".

SECTION 2. (1) Section 20.58 of the statutes is hereby repealed and the unexpended balance of the appropriation made by said section is reappropriated to Wisconsin employment relations board for the administration of chapter 111 until July 1, 1939.

(2) Section 20.58 of the Wisconsin statutes is hereby recreated to read:

20.58 Wisconsin employment relations board; appropriation; salaries. There is hereby appropriated from the general fund to Wisconsin employment relations board annually beginning July 1, 1939, fifty thousand dollars for the administration of chapter 111. There is hereby allotted to each member of Wisconsin employment relations board out of any

sums appropriated for the administration of chapter 111 an annual salary of five thousand dollars.

SECTION 3. Section 298.01 of the statutes is amended to read: **298.01 Arbitration clauses in contracts enforcible.** A provision in any written contract to settle by arbitration a controversy thereafter arising out of such contract, or out of the refusal to perform the whole or any part thereof, or an agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, shall be valid, irrevocable and enforcible save upon such grounds as exist at law or in equity for the revocation of any contract; provided, however, that the provisions of this chapter shall not apply to contracts between employers and employes, or between employers and associations of employes, *except as provided in section 111.10 of the statutes.*

Effective Date: May 5, 1939.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 124.

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL NO. 122; PHIL L. VALLEY, JOHN ALEXANDER and JACK HEISDORF, Each Individually, as Business Agent, Organizer, and Vice-President, Respectively, for, and as Representatives of, All the Members of Hotel & Restaurant Employees' International Alliance No. 122;
INTERNATIONAL LAUNDRY WORKERS, LOCAL NO. 174;
BARTENDERS INTERNATIONAL LEAGUE OF AMERICA, LOCAL NO. 64, sometimes Known as International Bartenders and Beverage Dispensers, Local No. 64;
INTERNATIONAL UNION OPERATING ENGINEERS, LOCAL NO. 311;
MILWAUKEE BUILDING TRADES COUNCIL;
All Affiliated With the American Federation of Labor,
Petitioners and Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD; HENRY C. FULDNER, Individually and as Chairman of, L. E. GOODING, Individually and as a Member of, R. FLOYD GREEN, Individually and as a Member of, the Wisconsin Employment Relations Board;
PLANKINTON HOUSE COMPANY, a Corporation,
Respondents and Appellees.

REPLY BRIEF

In Support of Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin.

JOSEPH A. PADWAY
and
I. E. GOLDBERG,
Attorneys for Petitioners.

St. Louis Law Printing Co., 415 North Eighth Street CEntral 4477

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Petitioners' sole interest lies in preserving for themselves and for organized and unorganized workingmen in the State of Wisconsin the right to peacefully picket when engaged in a dispute or controversy with either their employer or with other employees or groups of employees 3

The findings of fact and conclusions of law by the Circuit Court for Milwaukee County in proceedings brought by the Attorney-General, alleging that the petitioners are in contempt of Court for violation of the order which is now before this Court for review, provides persuasive and eloquent argument for granting of the petition prayed for 3–4

In the contempt proceedings the Court found that peaceful picketing activities, whether conducted at or near the Plankinton House Company and other activities, including direct appeal to others not to use the hotel facilities, constitute a violation of the order 5

The Circuit Court has precluded these petitioners from applying to it for relief from the original order by making findings that although no act of violence has occurred since November 17, 1939, nevertheless, "in all probability violence, threats, force, coercion and intimidation will be engaged in at any time that conditions are favorable thereto" 5

Decisions of the Wisconsin Supreme Court rendered subsequent to the filing of the petition for writ of certiorari demonstrate the necessity for the Supreme Court of the United States to grant the petition prayed for so that there will be no further curtailment or interference with the exercise of the rights of free speech by labor organizations in the State of Wisconsin 7

The Attorney-General in his brief seeks to reduce the important issues in this case to the simple proposition that the order is completely justified under the terms of this Court's decision in the case of Milk Wagon Drivers' Union of Chicago v. Meadowmoor Dairies. That is not the issue in the case 11

Assuming that the order which petitioners seek to have this Court review is based upon an attempted application of the principles enunciated in the Meadowmoor case, nevertheless, the facts of the case do not justify application of those principles, and the order itself far exceeds the limitations set forth in the Meadowmoor case 18

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 124.

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL NO. 122; PHIL L. VALLEY, JOHN ALEXANDER and JACK HEISDORF, Each Individually, as Business Agent, Organizer, and Vice-President, Respectively, for, and as Representatives of, All the Members of Hotel & Restaurant Employees' International Alliance No. 122;
INTERNATIONAL LAUNDRY WORKERS, LOCAL NO. 174;
BARTENDERS INTERNATIONAL LEAGUE OF AMERICA, LOCAL NO. 64, Sometimes Known as International Bartenders and Beverage Dispensers, Local No. 64;
INTERNATIONAL UNION OPERATING ENGINEERS, LOCAL NO. 311;
MILWAUKEE BUILDING TRADES COUNCIL;
All Affiliated With the American Federation of Labor,
Petitioners and Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD; HENRY C. FULDNER, Individually and as Chairman of, L. E. GOODING, Individually and as a Member of, R. FLOYD GREEN, Individually and as a Member of, the Wisconsin Employment Relations Board;
PLANKINTON HOUSE COMPANY, a Corporation,
Respondents and Appellees.

REPLY BRIEF

In Support of Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin.

To the Honorable the Justices of the Supreme Court of the United States:

While under ordinary circumstances a reply brief is not necessary, petitioners have deemed it advisable to file one in view of special circumstances in this case, occurring since the original brief was filed.

These special circumstances are as follows:

i. The Circuit Court for Milwaukee County, which originally enforced the orders of the Wisconsin Employment Relations Board in the instant case, has since in contempt proceedings brought by the Wisconsin Employment Relations Board, found the petitioners in contempt of court for violations of the order.

ii. Since rendering the decision in the instant case the Supreme Court of the State of Wisconsin has rendered two additional decisions relating to labor disputes, which cast light on that court's attitude in such matters, and demonstrate the necessity for issuance of a writ in the instant case.

iii It is apparent from the brief filed by the Attorney-General of the State of Wisconsin in opposition to the petition for writ of certiorari that justification for the Wisconsin Supreme Court's decision is based upon a subsequent decision of this Court in the case of **Milk Wagon Drivers' Union of Chicago, Local 753, et al. v. Meadowmoor Dairies, Inc.**, 61 Sup. Ct. 552, although the principles therein expressed did not constitute the basis for the order of the Wisconsin Employment Relations Board.

ARGUMENT.

At the outset petitioners want to make their position clear to this Court. Their sole interest lies in preserving for themselves and for organized and unorganized workingmen in the State of Wisconsin the right to peacefully picket when engaged in a dispute or controversy with either the employer or with other employees or groups of employees. The decision of the Wisconsin Supreme Court in this case, as well as its decisions in subsequent cases, clearly indicate that such rights are being denied and will continue to be denied by the Wisconsin courts unless some clear-cut statement is made by this Court with respect to the devices relied upon to effectually prohibit the right of peaceful picketing in the State of Wisconsin.

The Attorney General of the State of Wisconsin in his brief opposing granting of a writ of certiorari has made comment of the fact that in our original brief in support of the petition we went outside of the record to refer to the contempt proceedings which were then pending in the Circuit Court.

It is true that the contempt proceedings are not now properly before this Court. However, it is not possible to present the contempt proceedings contemporaneously with the petition for writ of certiorari because of the obvious delay which will be experienced in appealing from the contempt judgment to the Supreme Court of the State of Wisconsin, and, if upheld, to this court. We therefore take the liberty of appending hereto the findings of fact and conclusions of law in that contempt proceeding, not for review by this Court, but as representing persuasive argument in support of our contention that the right of free speech has been denied to these petitioners, and in support of the petition for writ of certiorari.

Similarly, the decisions of the Wisconsin Supreme Court in the cases of **Carpenter Baking Company v. Bakery Sales Drivers Local Union No. 344 et al.** (not yet officially reported), and **Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers and Dairy Employees' Union, Local No. 225, etc.** (not yet officially reported), are not matters which are properly before this Court for review. Copies of those decisions, however, are appended hereto, again for the purpose of enabling this Court to ascertain the treatment which the Wisconsin Supreme Court has given to picketing in labor controversies and the manner in which that court has sought to distinguish its decisions from the otherwise persuasive decisions of this Court in the cases of **Senn v. Tile Layers' Protective Union**, 301 U. S. 468; **Lovell v. Griffin**, 303 U. S. 444; **C. I. O. v. Hague**, 307 U. S. 196; **Schneider v. State**, 308 U. S. 147; **Thornhill v. Alabama**, 310 U. S. 88; **Carlson v. California**, 310 U. S. 106; **Milk Wagon Drivers' Union of Chicago, etc., v. Meadowmoor Dairies, Inc.**, 61 Sup. Ct. 552, and **American Federation of Labor v. Swing**, 85 L. Ed. (Adv. Op.) 512.

THE CONTEMPT PROCEEDINGS.

In our opinion the findings of fact and conclusions of law of the Circuit Court for Milwaukee County in the contempt proceedings speak for themselves. We do point out briefly, however, that the Circuit Court for Milwaukee County found these petitioning unions in contempt of the order which the unions have petitioned this Court to review, for having engaged in the conduct enumerated in paragraphs XII, XVIII and XX of the findings of fact (Appendix, pages 13, 16, 20).

Paragraph XII sets forth conduct which constitutes peaceful picketing in every sense of the word. Paragraph XVIII relates to the picket line as being intimidatory and coercive.

In paragraph XX the finding is made that the functioning of the Milwaukee Federated Trades Council and the Wisconsin State Federation of Labor, through which the support of the public was solicited, constituted merely an extension of the picket line referred to in paragraph XVIII. Certainly, the interpretation of the extent of the order by the Circuit Court is more persuasive than any argument which the Attorney-General may make.

In paragraph XXVII (Appendix, page 23) the Court found that all of the activities set forth in the findings of fact, which included not only the peaceful picketing at or near the premises, but display of placards in other parts of the city, the carrying of signs on moving vehicles in other parts of the city, the writing of letters, and the persuasion of others not to use the hotel facilities, "when weighed in the light of all the circumstances and the real nature of the methods employed, have materially exceeded the bounds of peaceful picketing, persuasion or advertising."

In finding of fact XXVIII (Appendix, page 24) the Circuit Court makes the finding that "in all probability violence, threats, force, coercion and intimidation will be engaged in at any time that conditions are favorable thereto." This finding is made almost two years after the last occurrence of violence on the picket line at the inception of the strike. There has been absolutely no violence of any kind since that time.

Additionally, the afore referred to findings answer very eloquently the argument made by the Attorney-General at pages 33 and 34 of the State's brief that the obvious remedy of these petitioners is to apply to the Circuit Court of Milwaukee County for modification of the decree. The Circuit Court for Milwaukee County has already an-

ticipated any such action by making finding XXVIII (C), afore referred to.

The last act of violence was found to have occurred on November 17, 1939. Nevertheless, on August 2, 1941, almost two years later, the Court to which we are directed to apply for relief made the finding that "in all probability violence, threats, force, coercion and intimidation will be engaged in at any time that conditions are favorable thereto." Yet careful examination of all the other findings of fact made by the Court demonstrates conclusively that there is absolutely no basis for such finding. The fact is that there has not been one instance of violence, threats, force, coercion or intimidation since November 17, 1939. The only apparent basis for this finding of the Court is the Court's adoption of the Attorney-General's theory that peaceful picketing, the establishment of a picket line of not more than two or three pickets, and the making of oral or written requests to gain the support of other labor organizations or the public generally, constitute coercion or intimidation. Certainly this theory of the Court pleads more persuasively than any argument we can make for the granting of the writ and the reversal of the decision.

What is also of special interest in the contempt proceeding is the fact that the Circuit Court in findings XXIV through XXVII (Appendix, pages 21-23), in ascertaining whether or not the order has been violated, has made findings as to purported illegal objectives of the picketing and boycotting—a matter which enters this case for the first time in the contempt proceeding.

This question has never been raised before, was not litigated in the original proceedings at any stage thereof, and played absolutely no part in the previous decisions of the Wisconsin Employment Relations Board, the Circuit

Court for Milwaukee County, and the Supreme Court of the State of Wisconsin. It is an attempt, in our opinion, to rely upon the subsequent decision of the Wisconsin Supreme Court in the case of **Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers' Union, Local 225 et al.**, which decision is set forth in the appendix hereto.

These findings by the Circuit Court as to the purported illegal objective, following the lead of the Wisconsin Supreme Court in the above referred to case, constitute another persuasive reason why this Court should grant the petition for certiorari and terminate once and for all these specious attempts to override the decisions of this Court and the Constitution of the United States.

SUBSEQUENT DECISIONS OF WISCONSIN SUPREME COURT.

The decision of the Wisconsin Supreme Court in the case of **Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers and Dairy Employees' Union** speaks for itself. In connection with that case we desire to specifically point out that the Wisconsin Supreme Court determined that the activities of the union were invalid under a judgment which it construed as banning all picketing, upon the grounds that:

a. The picketing was for the purpose of compelling the employer to commit an illegal act, that is, to sign a closed shop agreement which was not approved by 75 per cent of the employees in a secret referendum conducted by the Wisconsin Employment Relations Board;

b. That such picketing was subject to restraint no matter at whom directed. (The case clearly involved a controversy between employes.)

c. Picketing, while not violent, was, nevertheless, coercive, and, therefore, subject to restraint.

d. The legality of the picketing is measured by its effect upon the employer.

e. In effect there can be no picketing in furtherance of employer-employee disputes.

f. The purported applicability of the **Meadowmoor** case, although the record in this case is devoid of violence.

Inasmuch as the decision in the case of **Carpenter Baking Company v. Bakery Sales Drivers' Local Union No. 344 et al.**, set forth in the appendix hereto, is not accompanied by an opinion (the equal division of the court, one of the justices being ill and not participating, resulting in affirmance of the judgment appealed from) no specific comment can be made other than to point out that the judgment appealed from, among other things, prohibited the union, its officers, agents, servants, and employees

"• • • (3) From inciting or attempting to persuade persons not to deal with the plaintiff or the plaintiff's employees or with retail dealers offering plaintiff's products for sale."

There was no violence involved in that case. The Circuit Court of Milwaukee County, in issuing its injunction, stated in its decision:

"Upon the facts submitted in this case, there can be no finding made that a labor dispute has at any time existed as between the plaintiff and its employees. • • • It is understandable, therefore, that when it was proposed on several occasions that the employees organize, they saw no necessity for it, and declined to join the Union of their own volition. I, therefore, find and decide that at no time has a labor dispute, as that term is defined in section 111.02, subsection (8), existed."

[Section 111.02 (8) reads as follows:

"The term 'labor dispute' means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process of details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute."]

"It clearly appears that the acts complained of, which are established in the evidence in this case, are prohibited by the statutes, which declare (Section 111.06) 'It shall be an unfair labor practice for an employe, individually or in concert with others: * * * (e) To co-operate in engaging in, promoting or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employes of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.' * * *

"The plan as carried out definitely offends against the provisions of subsection (e) of section 111.06, paragraph (2), for it calls for a co-operation of a number of members of the union to engage in, promote or induce picketing, boycotting, or other overt act. In the language of the statute, this conduct is declared to be an unfair labor practice. * * *

"I believe that all of the matters which are urged by the defendants, challenging the constitutionality of the statutes in question, are decided in the case of **Hotel & Restaurant Employees' International Alliance, Local No. 122, et al. v. Wisconsin Employment Relations Board et al.** * * *"

That Court also found in its findings of fact:

"Eighth: That the defendants have co-operated together in engaging in, promoting and inducing the boycotting of the bakery products manufactured for sale by the plaintiff and sold by employees of the plaintiff, all contrary to the provisions of Section

111.06 (2) (e), Wisconsin Statutes, and, in furtherance of the purpose of such combination, the defendants have adopted means and engaged in conduct intended and reasonably calculated to coerce and intimidate plaintiff's employes while performing their usual and ordinary services for the plaintiff.

"Ninth: That on the 12th day of August, 1940, and each day subsequent thereto, defendants Elmer Johnson, Joseph Reichartz, Gilbert Schlechta and G. McMicken, while acting for and on behalf of the above-named defendant labor union, and in furtherance of the common purpose of said defendants hereinbefore mentioned, persistently followed plaintiff's delivery trucks about the City of Milwaukee while said trucks were being used to deliver bakery products to retail dealers in the City of Milwaukee, and when plaintiff's bakery sales drivers stopped such delivery trucks in the vicinity of such retail dealers' places of business said defendants entered such places of business and requested and encouraged plaintiff's customers to discontinue purchasing bakery products from the plaintiff, and represented to such customers that there was labor trouble at plaintiff's plant, and said defendants also walked about plaintiff's delivery trucks and such customers' places of business carrying signs and placards containing the following legend: 'This Carpenter Baking Co. employee is not a member of Bakery Sales Drivers' Union, Local 344. Please do not patronize.' "

That Court also found as conclusions of law:

"First: That the acts of the defendants constitute unfair labor practices within the meaning of the term 'unfair labor practice' as defined by Section 111.06 of the Statutes of the State of Wisconsin.

"Second: That no labor dispute exists between the plaintiff and defendants as defined in Section 111.04 of the Statutes of the State of Wisconsin.

"Third: That the provisions of Chapter 111 of the Statutes of the State of Wisconsin are valid and con-

stitutional enactments and do not violate the constitutional guaranty of freedom of speech."

[Section 111.06 (2) (e) is that section of Chapter 111 of the Wisconsin Statutes which was considered by the Wisconsin Supreme Court in the instant case, and which is challenged by the petitioners herein as being unconstitutional and void.]

By virtue of the decisions afore referred to there has now arisen in the State of Wisconsin a situation which directly challenges and threatens the rights of working men, organized and unorganized, to publicize their grievances and their opinions with respect to matters growing out of the employment relationship, and to enlist the support of the public in furthering their own interests. It is for that reason that it is a matter of great urgency that this Court grant the petition for writ of certiorari, and make it clear that this Court's previous decisions, above referred to, have equal applicability in the State of Wisconsin as well as in the other states in the Union.

THE BRIEF OF THE ATTORNEY-GENERAL.

The brief of the Attorney-General on certiorari attempts to reduce all of the momentous issues in this case to one simple conclusion, namely, that the Wisconsin Supreme Court in the case at bar and on rehearing has done nothing more than to hold that the courts in Wisconsin have jurisdiction and the power to issue injunctions which prohibit violence.

That is an attempt to camouflage and conceal the true issues of the case. The right of the State of Wisconsin to enjoin violence was not put in issue by petitioners at any time in the proceedings from the time they were commenced before the Wisconsin Employment Relations Board to their termination in the Supreme Court of the state.

We pointed out most clearly that we did not challenge the right of the Board or the Court to issue an injunction restraining violence. We further pointed out that there was no need of a statute such as the Employment Peace Act to impose such jurisdiction in the Wisconsin courts. We pointed out, too, that the affirmation of such jurisdiction in the Employment Peace Act as set forth in Sections 111.06 (2) (f) (g) and (j) were not challenged, and that these sections were not in issue. What we did point out and which is the fact in this case was that the Wisconsin Employment Relations Board based its right to issue this injunction on section 111.06 (2) (e), and that this section synchronizes with section 111.02 (8), defining a labor dispute as

> "• • • any controversy between an employer and the **majority of his employees** in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute." (Emphasis ours.).

It is strange, indeed, that the Wisconsin Supreme Court should have found it necessary to discuss in great detail "unauthorized strikes" as constituting unfair labor practices and assert most conclusively that engaging in promotion of picketing in furtherance of an unauthorized strike was a violation of section 111.06 (2) (e), and that, therefore, the cease and desist order is valid (Supp. Record p. 56). Surely the Wisconsin Supreme Court could not make so definite and conclusive a finding and then say that it made such holding not to deny these petitioners of their right of free speech, but that such right was denied because there has been some violence on the picket line.

The subtlety of such combination in the construction of patently unconstitutional enactments and the poisonous

effects thereof become manifest when trial courts come to pass upon the peaceful activities of workers in furtherance of their dispute on the basis of such construction by the Wisconsin Supreme Court of the Employment Peace Act. As it appears from the appendix hereto, the trial court in this case in contempt proceedings brought because of alleged violations of the original order has found union officials guilty of contempt for engaging in peaceful activities.

On the basis of the subtle construction of 111.06 (2) (e) another trial court in the **Carpenter Baking Company** case, referred to herein, held that there was no labor dispute under section 111.02 (8) because a majority or all of the employees failed to authorize a strike, and that court, therefore, enjoined picketing because of claimed violation of section 111.06 (2) (e), which makes such picketing and boycotting an unfair labor practice, when not approved by a majority of the employees in a secret ballot. This latter holding by the Circuit Court for Milwaukee County has been affirmed by the Wisconsin Supreme Court in a divided opinion. (See appendix.)

Thus the simple formula, so naively presented by respondents in their subtle attempt to exclude what the courts have truly conceived to be the issue and truly held in these cases, is exposed as wholly fallacious by the very application by the trial courts of the principles enunciated by this Court in the cases before them, and which application the Wisconsin Supreme Court affirmed.

We repeat that violence and the right to enjoin it was not the issue in this case, and we repeat most emphatically that the Board's decision was not premised on that issue. We again point out that if the Board's order and the original order of the Circuit Court enforcing such order were premised upon a finding that the peaceful activities were

so enmeshed with violence that it could be honestly and reasonably held that future peaceful activities would also engender violence, then the Circuit Court for Milwaukee County certainly would not have permitted continuation of such peaceful activities pending the appeal to the Wisconsin Supreme Court.

It is regrettable that the **Meadowmoor** decision of this court has been utilized by justices who have refused to accept the principles pronounced in the Norris-La Guardia Act and in the **Swing** case, or who have sought to construe statutes to death for the purpose of overcoming and defeating the decisions of this court in the **Thornhill, Carlson** and **Swing** cases.

In fact, justices with a clearer vision and a more ready desire to accept the United States Supreme Court pronouncements have had occasion to direct the attention of their brethren of such aptitude to misapply the **Meadowmoor** case. Justice Lehman, Chief Justice of the New York Court of Appeals, in **Opera on Tour, Inc., v. Weber**, 34 N. E. (2d) 349 (N. Y.); Justice Farthing of the Illinois Supreme Court in **Ellingsen v. Milk Wagon Drivers Union of Chicago, Local 753**, 35 N. E. (2d) 349 (Ill.), and **2063 Lawrence Avenue Building Corporation v. Gust Van Heck**, 35 N. E. (2d) 373 (Ill.).

The writer of the decision in the case of **Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers Local 225**, copy of which is appended hereto, vigorously dissented in the earlier Wisconsin cases of **American Furniture Company v. I. B. T. C. S. & H. of A.**, 222 Wis. 338, and **Senn v. Tile Layers' Union**, 222 Wis. 383, subsequently affirmed by the United States Supreme Court in 301 U. S. 468, and now sees in the **Meadowmoor** case the opportunity to evade the holding of this Court in the **Senn** case, and to substitute his own view as expressed in his dissents.

Unless the justices so disposed not to follow the decisions of the United States Supreme Court are curbed in their predilections, the Norris-La Guardia Act and other prototypes will suffer the same fate as did the Clayton Act. This Court only recently had occasion to make known to the courts of the states of New Jersey, Illinois and New York that they must be bound by the interpretations of the United States Constitution placed on it by the United States Supreme Court (**Miller v. Journeymen Tailors' Union**, 61 Sup. Ct. 632; **American Federation of Labor v. Swing**, 61 Supr. Ct. 568; **Wohl and Platzman v. Bakery & Pastry Drivers & Helpers' Local 802**, 85 L. Ed. [Adv. Op.] 998). We repeat that it is regrettable that after the plain and clear decisions of this court in the **Senn, Thornhill** and **Carlson** cases it should, nevertheless, have become necessary to reverse the New York Court of Appeals in the **Platzman** case, the New Jersey court in the **Miller** case, and the Illinois court in the **Swing** case. In our opinion this demonstrates a reluctance on the part of many state courts to accept the principles enunciated by this Court when the acceptance of such principles means that their own economic predilections must give way.

In the brief of the Attorney-General of the State of Wisconsin, opposing the granting of the writ of certiorari in the instant case, it is asserted that the decision of this Court in the case of **Milk Wagon Drivers' Union of Chicago etc. v. Meadowmoor Dairies, Inc.**, 61 Sup. Ct. 562, is completely controlling and constitutes complete justification for the judgment appealed from.

It is interesting to note in the first instance that the **Meadowmoor** case was decided approximately eleven days after the Wisconsin Supreme Court rendered its decision on the motion for rehearing in the instant case.

It is claimed that the Wisconsin Employment Relations

Board, in applying the statute (Section 111.06 (2) (c), and the Circuit Court and the Supreme Court of the State of Wisconsin anticipated correctly this Court's holding in that case. The fact is that the Wisconsin Employment Relations Board did no such thing. We again invite careful reading of the decision, findings of fact, conclusions of law, and order of the Wisconsin Employment Relations Board (R. 251-270), and challenge the assertion of the Attorney-General that such board anticipated the **Meadowmoor** case in coming to its determination.

The fact is that the order entered by the Board is not based in any way upon a finding or claim that the few isolated acts of mild disorder which took place the first few weeks of the strike so characterized the activities of the unions that the Board, in the exercise of its judgment, determined to prohibit all activities. It is further apparent that the Board made no finding that these few isolated acts of disorder were such that it "could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful" (**Milk Wagon Drivers' Union of Chicago etc. v. Meadowmoor Dairies, Inc.**, supra).

While it is true that both the Circuit Court and the Supreme Court of the State of Wisconsin made reference in their decisions to the acts of violence, the fact remains that neither the Circuit Court nor the Wisconsin Supreme Court had any jurisdiction other than to enforce the order of the Board. The determination of whether or not an order should be entered and the reasons for entering such order rested with the Board in the first instance.

In this connection it is interesting to note that the Wisconsin Supreme Court in the case of **Allen Bradley Local 1111 etc. v. Wisconsin Employment Relations Board**, 237 Wis. 164, 295 N. W. 691, in dealing with the powers and authority of the board, pointed out:

> "As already stated, the manner and extent to which the act shall apply in a particular case pending before it is committed to the discretion of the board."

In the instant case the Board did not exercise its discretion to issue a restraining order on the basis of the principles enunciated in the **Meadowmoor** case.

As we understand the decision of this Court in the **Meadowmoor** case the only justification for the entry of an order prohibiting all picketing (the order in the instant case prohibits boycotting also) must lie in the express finding of acts of extreme violence, which are so enmeshed with the peaceful, legitimate activities that the trier of fact can come to the reasonable conclusion, supported by facts, that such complete ban is warranted in the exercise of the honest discretion by the trier of fact.

In the instant case the Wisconsin Employment Relations Board did not come to such conclusion, nor did it in any way seek to justify its conclusion on that basis. Any attempt, therefore, on the part of the Supreme Court of the State of Wisconsin to subsequently justify such order, by substituting its own findings of fact or by misinterpreting and rewriting the order to conform to the **Meadowmoor** case must be rejected as an effort to accomplish a result which cannot be otherwise justified.

As we pointed out in our original brief, in support of the petition for writ of certiorari, this Court does have jurisdiction to issue a writ of certiorari to a state court where any device used to support the decisions is "so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent review of the decision on the federal question" (**Leathe v. Thomas**, 207 U. S. 92, 99; **Ohio State Bank v. Bryan**, 282 U. S. 765, 774; **Johnson v. Risk**, 137 U. S. 300, 307).

ASSUMING THAT THE ORDER WHICH PETITIONERS SEEK TO HAVE THIS COURT REVIEW IS BASED UPON AN ATTEMPTED APPLICATION OF THE PRINCIPLES ENUNCIATED IN THE MEADOWMOOR CASE, NEVERTHELESS THE FACTS OF THE CASE DO NOT JUSTIFY APPLICATION OF THOSE PRINCIPLES, AND THE ORDER ITSELF FAR EXCEEDS THE LIMITATIONS SET FORTH IN THE MEADOWMOOR CASE.

As we also pointed out in our original brief, the purported ground for sustaining the order as based upon the **Meadowmoor** case loses complete validity when it is remembered that the Circuit Court, after rendering its decision enforcing such order, permitted the labor organizations to continue picketing **at or near** the Plankinton House pending the appeal (R. 52-57). Certainly if the original order were based upon a finding that the isolated and esoteric acts of violence engaged in were so enmeshed with the peaceful activities that it would be imminently dangerours to permit continued peaceful activities there can be no possible justification for permitting such peaceful activities pending the final determination of the Wisconsin Supreme Court. The Court cannot blow hot and cold at the same time. It cannot say on the one hand that there can be no such thing as peaceful picketing in view of the circumstances, and on the other hand, however, permit peaceful picketing.

Nor does the holding of this Court in the **Meadowmoor** case in any way justify an order which prohibits boycotting whether conducted at or near the premises where a strike is in progress or at any other place. Yet the Attorney General in his brief argues that the only question before this Court relates to the validity of the order

which prohibits picketing at or near the Plankinton House. Certainly that part of the order which prohibits boycotting must also be considered by this Court.

Finally, we desire to point out to this Court that in the brief of the Attorney-General at pages 15 through 19 there is an enumeration of instances of "violence" which, it is insisted, bring this case within the doctrine of the **Meadowmoor** case. In that enumeration counsel goes outside of the findings of fact made by the Board and refers to incidents involving the finding of shingle nails on one occasion, the finding of a stench bomb on another occasion, and broken windows on another occasion. (Objection was duly made to any evidence regarding these incidents [R. 146; 156, 157].) These events were not in any way or in any manner attributable to the union, and the Board, therefore, did not refer to them in its findings of fact. It is, therefore, manifestly unfair for the Attorney-General of the State of Wisconsin to comb the record for the purpose of finding whatever remote unsupported fact he can in order to discredit the union, and in an effort to bring the instant case within the decision of this Court in the **Meadowmoor** case.

Similarly, the Attorney-General emphasizes at page 18 of his brief that a police captain testified to the number of arrests and convictions, but does not inform this Court that this testimony merely summarized the findings which were set forth in detail on pages 15 to 17 of the brief.

Similarly, the activities of the union are referred to as constituting violence, crimes, and misdemeanors, when in fact the proceedings which resulted in fines were civil proceedings for the purpose of collecting a penalty for violation of city ordinances (**Milwaukee v. Johnson**, 192 Wis. 585, 213 N. W. 335).

The fact remains that there were exactly seven incidents which even remotely resembled disorders in a strike involving over 188 employees, three of which incidents occurred on November 4, 1939, two days after the commencement of the strike, and the remainder of which occurred between November 5, 1939, and November 17, 1939 (R. 257-259). The hearing before the Wisconsin Employment Relations Board was held on December 10, 11, 12, 13 and 14, 1939 (R. 9). Note particularly the testimony of the police captain that the police department "has been able to maintain order very, very adequately," and that it had "the situation very well in hand" (R. 197, 198).

It is on the basis of this showing that it is now claimed, although not found by the trier of fact, that the injunction can be supported under the doctrine enunciated by this Court in the **Meadowmoor** case.

Human experience aptly demonstrates that a few fugitive encounters on the picket line in the early stages of a strike can no more be controlled or prevented by responsible leaders or organized labor than can the sun be stopped in its course. The intensity of emotion, the livelihood that is at stake, the desire to protect a job for oneself and one's dependents, inject into strikes and picketing such elements that must of necessity in some cases and in the early days of a strike, when feelings naturally run high, lead to some cases of spontaneous eruption. Surely these are not the activities that this Court meant when it referred to "the momentum of fear generated by past violence."

To penalize workingmen by depriving them of the constitutionally guaranteed right of free speech because of occasional excesses indulged in by co-workers of more volatile emotion (many of which excesses are instigated

or provoked by others, as demonstrated in the reports of the Senator LaFollette Investigating Committee) is indeed to exact a price all out of proportion to the value of the rights at stake.

Respectfully submitted,

JOSEPH A. PADWAY and
I. E. GOLDBERG,
Attorneys for Petitioners.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 124.

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL NO. 122, et al.,
Petitioners and Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD et al.,
Respondents and Appellees.

APPENDIX TO REPLY BRIEF

In Support of Petition for Writ of Certiorari, Setting Forth

1. Findings of Fact and Conclusions of Law in the Contempt Proceedings.
2. Decision of the Wisconsin Supreme Court, Filed on June 25, 1941, in Wisconsin Employment Relations Board vs. Milk & Ice Cream Drivers and Dairy Employees' Union, Local No. 225.
3. Decision of the Wisconsin Supreme Court, Filed on June 25, 1941, in Carpenter Baking Co. vs. Bakery Sales Drivers Local Union No. 344 (A. F. of L.) et al.

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STATE OF WISCONSIN

CIRCUIT COURT MILWAUKEE COUNTY

Case No. 170-382.

Hotel & Restaurant Employees' International Alliance, Local No. 122; Phil L. Valley, John Alexander, and Jack Heisdorf, each individually, as business agent, organizer, and vice president, respectively, for, and as representatives of, all the members of Hotel & Restaurant Employees' International Alliance, Local No. 122;

International Laundry Workers, Local No. 174;

Bartenders International League of America, Local No. 64, sometimes known as International Bartenders & Beverage Dispensers, Local No. 64;

International Union Operating Engineers, Local No. 311;

Milwaukee Building Trades Council;

All affiliated with the American Federation of Labor,

Petitioners,

vs.

Wisconsin Employment Relations Board; Henry C. Fuldner, individually and as chairman of, L. E. Gooding, individually and as a member of, R. Floyd Green, individually and as a member of, the Wisconsin Employment Relations Board; the Independent Organization of Plankinton House Employees; and Plankinton House Company, a corporation,

Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW PREPARED BY THE COURT.

This matter came on to be heard before the court upon the petition of the Wisconsin Employment Relations Board, the exhibits and affidavits thereto annexed, and an

order to show cause based thereon, wherein it was ordered that the Hotel & Restaurant Employees' International Alliance, Local No. 122, its president, Al Gamby, its business agent, Phil L. Valley, its organizer, John Alexander, and its vice president, Jack Heisdorf; International Laundry Workers, Local No. 174, its president, Vernon Byerly, its vice president, Arno Schulz, and its secretary-treasurer, Mary Barczynski; Bartenders International League of America, Local No. 64; its president, Edward Neumann, its vice president, Gus Johnson, its business agent, Jack Ward, and its secretary, James M. Manley; International Union of Operating Engineers, Local No. 311, its president, Fran J. Wild, its vice president, John Morrison, its financial secretary, Joseph Gellott, and its treasurer, Albert Kunz; Milwaukee Building & Construction Trades Council, its president, Peter T. Schoemann, its vice president, John Zancanaro, and its secretary and treasurer, Jacob J. Schaefer; Wisconsin State Federation of Labor, its president, Herman Seide, and its secretary and treasurer, John J. Handley; The Federated Trades Council, its secretary, Frank Ranney, and its organizer, Jac Friedrich, show cause before the above named court, Honorable Gustave G. Gehrz, Circuit Judge presiding, at the court room of said court, being Branch No. 5 of the Circuit Court for Milwaukee County, Wisconsin, in the Courthouse at Milwaukee, in the County of Milwaukee, State of Wisconsin, on the 21st day of March, 1941, at the hour of nine o'clock in the forenoon of said day or as soon thereafter as counsel could be heard, why they, the said unions and the officers above named should not be punished as and for a civil contempt for misconduct in failing to obey and in disobeying the judgment of this court, dated May 14, 1940, as set forth in said petition, and the exhibits and affidavits thereto annexed in accordance with the prayer of said petition, and why this

court should not grant the orders and relief prayed for in said petition.

The matter came on for hearing pursuant to the said order to show cause on the 21st day of March, 1941, before the circuit court for Milwaukee County, Honorable Gustave G. Gehrz, Circuit Judge, presiding.

The petitioner, Wisconsin Employment Relations Board, appeared by John E. Martin, Attorney General, and James Ward Rector, Deputy Attorney General, by N. S. Boardman, Assistant Attorney General. The Plankinton House Company, a corporation, appeared by Herman M. Knoeller, and the unions and their officers above named, appeared by Padway, Goldberg and Tarrell.

A preliminary motion to quash was argued and said motion denied. The case was adjourned for the mutual convenience of the court and the parties, all parties consenting thereto, until the 1st day of May, 1941. The case was heard on May 1 and May 2, 1941. The case was comprehensively argued for three full days, May 5, 6 and 7, after which briefs were later submitted, whereupon the court took the matter under advisement and the court on the 8th day of July, 1941, having rendered its decision, does hereby make and file the following findings of fact and conclusions of law:

FINDINGS OF FACT.

I.

That the Wisconsin Employment Relations Board is and was at all times referred to in these proceedings an administrative body created by Ch. 57, Laws of 1939, and that Henry C. Fuldner is the chairman and L. E. Gooding and R. Floyd Green are commissioners or members of said board.

II.

That the Hotel and Restaurant Employees' International Alliance Local No. 122 is a voluntary, unincorporated association (labor union) affiliated with the American Federation of Labor and with the Wisconsin State Federation of Labor. That said local is chartered by and affiliated with the Hotel & Restaurant Employees International Alliance and Bartenders League of America, A. F. of L., which is in turn chartered by the American Federation of Labor. That during all periods material to this case Al Gamby was president of said local until on or about the 1st day of January, 1941; Jack Heisdorf was vice president of said local; Phil L. Valley was and is business agent of said local, and that John Alexander was and is chairman of the strike committee of said local; that on the 1st day of January, 1941, Al Gamby resigned to accept employment without the state of Wisconsin, and since said date has not been affiliated with Local 122; that on said date (January 1, 1941) the above named Jack Heisdorf succeeded Al Gamby as president of said local and that Andrew Perenchio succeeded Jack Heisdorf on said date as vice president of said local. That said local has an approximate membership of 3,000.

III.

That the Bartenders International League of America Local No. 64 is a voluntary, unincorporated association (labor union) affiliated with the American Federation of Labor and with the Wisconsin State Federation of Labor; that Edward Neumann is the president of said local; that Gus Johnson is vice president of said local; that Jack Ward is business agent for said local, and that James M. Manley is secretary of said local, and were such at all times material to this case. That said local is chartered by and affiliated with the same international as the said Local 122.

which in turn is chartered by the American Federation of Labor. That said local has an approximate membership of 1000.

IV.

That the International Laundry Workers, Local No. 74 is a voluntary, unincorporated association (labor union) affiliated with the American Federation of Labor and with the Wisconsin State Federation of Labor; that Vernon Byerly is president of said local; that Arno Schulz is vice president of said local; and that Mary Barczynski is secretary-treasurer of said local, and were such at all times material to this case. That said local is chartered by and affiliated with the International Laundry Workers Union, which in turn is chartered by the American Federation of Labor. That said local has an approximate membership of 700.

V.

That International Union Operating Engineers, Local No. 311, is a voluntary, unincorporated association (labor union) affiliated with the American Federation of Labor and with the Wisconsin State Federation of Labor; that Frank J. Wild is the president of said local; that John Morrison is the vice president of said local, that Joseph Gellott is financial secretary of said local, and that Albert Kunz is treasurer of said local. That said local is chartered by and affiliated with the Operating Engineers International Union, which in turn is chartered by the American Federation of Labor. That said local has an approximate membership of 750.

VI.

That the Milwaukee Building and Construction Trades Council is a central labor organization composed of delegates of the various A. F. of L. locals in the city of Mil-

waukee, whose members are employed in the building trades crafts, all of which labor unions are affiliated with the American Federation of Labor and with the Wisconsin State Federation of Labor. That the officers are Peter T. Schoemann, president, John Zancanaro, vice president, and Jacob J. Schaefer, secretary and treasurer, and that said persons were such officers at all times material to this case. That all A. F. of L. building trades crafts locals in the county of Milwaukee are affiliated with this central body; that there are 32 such affiliated locals comprising a membership of approximately 20,000; that the Milwaukee Building and Construction Trades Council is chartered by Building Trades and Construction Trades Department of A. F. of L. and affiliated with the Wisconsin State Federation of Labor and with the Federated Trades Council, and that all of its affiliates are in turn affiliated with the Federated Trades Council and the Wisconsin State Federation of Labor.

VII.

That the Wisconsin State Federation of Labor is a voluntary association, statewide in scope; that Local A. F. of L. unions and central labor bodies are affiliated therewith for their mutual advancement. That some of the purposes of said Wisconsin State Federation of Labor are to devise means for the complete organization of labor in the State of Wisconsin, to coordinate the activities of all locals throughout the state, to cooperate with such locals in the attainment of their objectives; to establish better communication between the labor unions of said State of Wisconsin; to secure united and harmonious action in all matters affecting the welfare of organized workers, to circulate labor literature, to make known the enemies of organized labor; to endorse or protect whenever the labor interests of the people in Wisconsin may be involved; to promote the closest possible unity among laboring people in matters of

general concern; through combination and organization and affiliation and inter-affiliation, to secure and obtain the support of all affiliated unions and their members, the co-operation and united action of all affiliated unions and their members, prompt and concerted action of all affiliated unions and their members, and the entire numerical strength of all A. F. of L. affiliated unions in support of and in the attainment of the approved demands and objectives of a contending union or unions.

That since October 26, 1940, Herman Seide has been and is now president of the Wisconsin State Federation of Labor and that at all times material to this case John J. Handley has been and now is secretary and treasurer thereof. That prior to October 16, 1940, Henry Ohl, at all times material to this case, was president of said organization. That Henry Ohl died on or about October 16, 1940, and was succeeded by Herman Seide as president of said organization.

That there are approximately 1600 A. F. of L. unions in the State of Wisconsin, comprising a membership of approximately 200,000, of which approximately 225 locals are located in Milwaukee County, comprising an approximate membership of 80,000.

That the Wisconsin State Federation of Labor is composed of delegates elected by affiliated locals, each union of 100 members or less being entitled to one delegate and for each additional 100 members, or major fraction thereof, one additional delegate or vote. That the Wisconsin State Federation of Labor between conventions is governed by a general executive board consisting of the president, secretary, treasurer and eleven executive board members, four of whom reside in the city of Milwaukee, and seven of whom are from the various other parts of the State of Wisconsin.

That the executive board and officers are elected at the annual convention by the delegates of the organizations affiliated with the Wisconsin State Federation of Labor. That central labor organizations likewise are represented by delegates at the annual convention but voting by such delegates is limited as set forth in the constitution.

That local A. F. of L. unions are not obliged to affiliate with the Wisconsin State Federation of Labor. If local A. F. of L. unions wish to obtain the services and benefits that can be obtained from such organization they must affiliate. Practically all local unions are affiliated with the State Federation of Labor. The same is true of the central bodies or organizations.

Local unions affiliated with the Wisconsin State Federation of Labor must pay a monthly fee to said state organization based upon the membership or working membership of the local. Such affiliation and the payment for services rendered entitle the affiliated local to the benefits to be derived from organization, as hereinbefore set forth, and to the communications, pamphlets, letters, etc., sent out by the state organization to these locals which choose to avail themselves of the services and benefits that the state organization may render to its affiliates.

Federal labor union locals are chartered by the American Federation of Labor. They are organized upon an industrial basis rather than upon a craft basis. They may affiliate themselves with central bodies and the Wisconsin State Federation of Labor the same as any other local and are entitled to be represented at the annual convention of the Wisconsin State Federation of Labor the same as any other local.

VIII.

That the Federated Trades Council of Milwaukee is a voluntary association, affiliated with the American Federa-

tion of Labor and the Wisconsin State Federation of Labor. That it is a central labor body with which local labor unions in the Milwaukee County area may become affiliated; that it functions as a coordinating agency for A. F. of L. affiliates in Milwaukee County area in the same manner and for the same purpose as the Wisconsin State Federation of Labor for all affiliated unions in Milwaukee County except as noted in this finding. The aims, policies, purposes, functions and mode of operation of the Federated Trades Council of Milwaukee are the same as those of the Wisconsin State Federation of Labor set forth in the preceding finding hereof except as otherwise set forth in this finding.

The officers of said council are Frank Ranney, secretary, and Jac Friedrich, organizer, and they were such officers of said council at all times material to this case.

Local unions in the Milwaukee County area may, but are not obliged to, belong or affiliate with said council. That affiliation with said council requires the payment of dues by affiliated unions upon a basis similar to that of affiliation with the State Federation. The Federated Trades Council of Milwaukee is composed of delegates elected by affiliated unions. The council consists of three delegates from each local union having 100 members or less, and one delegate for every additional fifty or major fraction thereof. Central trade bodies are entitled to affiliate and to representation upon the council and to take part in discussions but are not entitled to vote.

All of the unions named in findings 2 to 6, inclusive, are affiliated with the Federated Trades Council. The officers of said unions, named in said findings 2 to 6, inclusive, are delegates to the council from their respective unions and have been such at all times material to this case. The Hotel and Restaurant Employees' International Alliance Local No. 122 has 53 delegates in the council; that the

Bartenders International League of America Local No. 64 has 16 delegates in the council; that the International Laundry Workers Local No. 174 has 8 delegates in the council; that International Union Operating Engineers Local No. 311 has 14 delegates in the council; and that the Milwaukee Building and Construction Trades Council has 220 delegates in the council.

That the council functions by holding meetings of the delegates biweekly. That the delegates of any affiliated local are free to and do present the problems of said local, the demands which it is making upon a particular employer, the progress made, the status of any controversy and in general any matter of importance to the said local, and to request and demand the support of all affiliated unions in the council in the attainment of its approved demands and requests. That said affiliated unions comprise an approximate membership of 80,000. That the Federated Trades Council, through its biweekly convention system of operation, is in constant touch with and in constant familiarity with the status of any controversy in which an affiliated local is engaged.

That following each biweekly meeting of the council a report of the proceedings of the council is printed and forwarded to each affiliated union. That each issue of said bulletin contains a "we do not patronize" list. That the council functions as a body whereby affiliated locals through combination and organization and affiliation and inter-affiliation, secure and obtain the support of all affiliated unions and their members, the cooperation and united action of all affiliated unions and their members, prompt and concerted action of all affiliated unions and their members, and the entire numerical strength of all A. F. of L. affiliated unions in support of and in the attainment of the approved demands and objectives of a contending union or unions.

IX.

All of said labor organizations described in findings 2 to 8, inclusive, hereof are located in the city of Milwaukee, Milwaukee County, Wisconsin.

X.

There were duly and personally served upon Padway, Goldberg & Tarrell, attorneys for the unions referred to in findings 2 to 6, inclusive, true and correct copies of the judgments, together with copies of notice of entry thereof in each of the three cases referred to in paragraphs 10 to 13, inclusive, of the petition in the instant proceeding, to-wit: Case No. 170-382 (unfair labor practice) on the 16th day of May, 1940, Case No. 170-381 (representation case) on the 20th day of May, 1940, and Case No. 170-880 (representation case) on the 20th day of May, 1940. Said representation cases above referred to arose out of the same labor dispute as is involved in this unfair labor practice case, No. 170-382. All of the unions and officers cited in this contempt proceeding had notice and knowledge of the judgments in said cases. All of the unions described in findings 2-6, inclusive, hereof, and the officers, agents and members thereof, and the officers and agents of the organizations described in findings 7 and 8 hereof, had knowledge of the appeal to the supreme court from the judgment of this court, dated May 14, 1940, the issues involved in said appeal and the decision of the supreme court on said appeal, rendered on November 8, 1940, and its decision on motion for rehearing, rendered on January 7, 1941, and the officers of said unions had themselves read, or had read to them, and had discussed said opinions and were thoroughly familiar with the contents thereof, as well as with the order of the board, this court's judgment of enforcement, dated May 14, 1940, and said decisions of the supreme court

affirming said judgment of enforcement. Petition for writ of certiorari is now pending in the Supreme Court of the United States.

XI.

A. From May 17, 1940, until January 13, 1941, the unions named in findings 2, 3, 4, and 6 daily conducted picketing and so-called advertising and by and large during the hours and at the places and in the numbers permitted by the qualified stay of this court dated May 17, 1940; that such picketing was ostensibly carried on as a method of advertising, whereas in truth and in fact, it substantially exceeded the bounds of actual, bona fide **advertising** as more fully set forth in finding 18. At all times during the period above mentioned, and when the so-called advertising was conducted, the pickets (alleged advertisers) wore aprons or "sandwich signs" which bore the following legend: "Plankinton and Kilbourn Hotels do not have a contract with A. F. of L. Hotel Unions. Please do not patronize."

B. Automobiles carrying signs on the tops thereof with the inscription above set forth, were employed by the unions named in findings 2, 3, 4, and 6 hereof, for the period commencing about May 20, 1940, and ending February 25, 1941. Said automobiles daily and for eighteen hours each day carried the inscription above mentioned and were driven throughout the city of Milwaukee and particularly through the downtown area bearing such inscription. That the number of automobiles displaying such signs were five in number. Said automobiles were driven particularly in the vicinity of boat docks, railroad depots, at boat and train times, and parked at said terminals where they would attract the attention of passengers arriving at said boat docks and railroad depots, and were driven through the downtown area where large numbers of people would see and read such inscription.

XII.

Commencing January 13, 1941, the unions named in findings 2, 3, 4, and 6 and the officers, agents and members thereof, knowingly and intentionally, prior to return of the remittitur by the Supreme Court and without previous leave or order of any court or the making of any application therefor, and upon deliberation and after giving consideration to the matters referred to in finding 10, and in concert with (except the picketing described on January 13, 1941) and acting under the advice of and with the encouragement, support and approval of the Wisconsin State Federation of Labor and the Federated Trades Council and the officers thereof, and of their counsel, Joseph A. Padway and I. E. Goldberg, commenced picketing the entrances to said hotels upon a 24 hour basis, day in and day out, including Sundays. Said counsel advised that to engage in said conduct was not a violation of the court's judgment. Such picketing upon such 24 hour basis is conducted in the following manner:

There were one to two pickets (most of the time two pickets) at the guest entrances to the hotels continuously day in and day out, including Sundays, upon a 24 hour basis. Pickets varying from one to two in number are stationed at the alley and delivery entrances to said hotels, used for the purpose of procuring essential goods, wares, merchandise and services in the conduct of the hotels. Picketing at the alley and delivery entrances is seldom upon a 24 hour basis, but commences between five and six o'clock in the morning and continues anywhere to from 9:30 P. M. to midnight.

At noon on January 13, 1941, there were eight pickets in number at the Plankinton Street entrance to the Plankinton Hotel. Said pickets paraded or marched in an elliptical formation designed to block ingress and egress via such

entranceway. This is the only occasion when the pickets partially interfered physically with egress and ingress of patrons and guests or other persons wishing to use said entrances. That John Alexander, captain of the pickets, shortly after this occurrence and on the same day, instructed the picket captains and the pickets not to march in such manner or in such numbers. Such instructions have been observed and followed.

That the pickets at all entrances and at all times wore aprons or "sandwich signs" from January 13, 1941, to February 25, 1941, bearing the legend "Plankinton and Kilbourn Hotels do not have a contract with A. F. of L. Hotel Unions. Please do not patronize." That on February 25, 1941, this legend was changed to read "Employees of the Plankinton and Kilbourn Hotels are not members of A. F. of L. Hotel Unions." This sign was in use at the time of hearing, and picketing was then being conducted, as set forth in this finding, but with the further objective and results set forth in findings 17 and 18.

XIII.

A. The change in wording on the sandwich signs worn by the pickets since February 25, 1941, resulted in neither a substantial increase or decrease in the business transacted by the hotels. The economic effect upon the hotels was as theretofore, and the use of the new signs in the same degree effectivly produced the result desired by the unions.

B. That this change in wording of the sandwich signs worn by the pickets was a sham and subterfuge designed to cloak the real purpose, intent and object of the picketing and other activities.

XIV.

That the unions named in paragraphs 2, 3, 4, and 6 of these findings, and the responsible officers and agents

thereof, have, since the inception of the strike on November 2, 1939, and at all times subsequent thereto, requested and procured the support and backing of the Wisconsin State Federation of Labor and the Federated Trades Council of Milwaukee. Since the inception of the strike, and at all times subsequent thereto, and at the request of said unions and the responsible officers and agents thereof, said unions have solicited and substantially procured the coordinated, continuous, united concert of action of all the affiliated organizations and the members thereof afforded by the Wisconsin State Federation of Labor and the Federated Trades Council.

XV.

That ever since May 17, 1940, the named labor organizations, set forth in paragraphs 2 to 8 inclusive (except Local 311, International Union Operating Engineers) and the responsible officers and agents thereof and other unions asked the general public not to patronize the Plankinton and Kilbourn Hotels, and have disseminated by word of mouth and in writing, whenever opportunity presented itself, that the Plankinton and Kilbourn Hotels are on the "we do not patronize" or "unfair" list; have written and contacted by telephone persons and organizations that had contracted with said hotels for the holding of banquets or conventions and have urged said parties and said organizations to hold the banquet or convention elsewhere.

XVI.

That in many instances where persons, firms and organizations had arranged for banquets, conventions or other functions to be held at the Plankinton Hotel the labor organizations named in paragraphs 2 to 8 inclusive (except Local 311 and the responsible officers and agents thereof) and other unions affiliated with the central bodies requested

such persons, firms or organizations to hold the banquets, conventions or other functions elsewhere than at the Plankinton or Kilbourn Hotels. That in a large number of instances the Plankinton and Kilbourn Hotels lost business, suffered cancellation of contracts and damages as a result thereof and lost business about to be scheduled because of said activities.

That said activities have been continuous throughout the period of the qualified stay granted by this court on May 17, 1940, and thereafter to the date hereof whenever cases arose when such activities might be engaged in.

XVII.

That the picketing engaged in commencing January 13, 1941, and which continued thereafter, created an arbitrary dead line or barrier along the pickets' path which had all of the force and significance of a "picket line" as set forth in the next succeeding paragraph.

XVIII.

A. That a fundamental tenet of A. F. of L. unionism and one of the cornerstones upon which such unionism is based is that of honoring an A. F. of L. picket or pickets. This fundamental concept and rule is usually expressed in terms of "not going through a picket line." One A. F. of L. picket in front of a place of business or establishment is a picket line within the rule and recognized as such by all A. F. of L. union members.

B. That the above mentioned rule creates an arbitrary dead line along the pickets' path beyond which no A. F. of L. member dare pass, regardless of whatever craft, trade, industry or profession the member may be in, and regardless of whether said member or the A. F. of L. union of which he is a member has any dispute with the picketed

place of business or employment, and regardless of whether said member's employer has any dispute with the picketed place of business or employment. That the result of the picketing which commenced January 13, 1941, and continued thereafter was to create such dead line along the pickets' path as above set forth and within public streets and alleys.

C. That any A. F. of L. member, regardless of whether said member or the A. F. of L. union of which he is a member has any dispute with the picketed place of business or employment, and regardless of whether said member's employer has any dispute with the picketed place of business, who disregards this rule of trade unionism and enters the place of business by "crossing the picket line" to himself perform any service for the picketed place of business or to patronize said place of business or to have any contacts therewith, or to perform any service for his employer by way of delivery of goods, wares, merchandise, material, equipment, supplies or the rendition of services, knows that he violates said rule and commits an act of disloyalty to his union and that he subjects himself or runs the risk of subjecting himself to fine, suspension or other diciplinary action by the union of which he is a member. Such disciplinary action may be and in this case was severe.

D. That the "not going through a picket line" rule is not a voluntary or optional matter with A. F. of L. members.

E. That the enforcement of the rule by way of disciplinary action of offenders is not entirely optional with the various locals affiliated with the Wisconsin State Federation of Labor and the Federated Trades Council of Milwaukee. There is at least a tacit understanding among all locals affiliated with the Federated Trades Council that the rule will be enforced as to all approved strikes. The strike involved in this case was approved.

F. That the arbitrary dead line along the pickets' path impeded and interfered with the free use of streets and alleys, entrances and exits and the making of needed deliveries and with any voluntary patronizing of the hotels by any A. F. of L. members.

G. That employers of A. F. of L. labor not involved in a particular controversy, as well as those who are involved, are informed and know all of the facts set forth in A, B and C of this finding.

H. That the effect of the arbitrary dead line along the pickets' path is to coerce and intimidate all A. F. of L. members not involved in the particular controversy who themselves or whose employers customarily have business relations with the picketed place of business, or who desire to establish business contacts with the picketed place of business. That the foregoing was the effect in this case.

I. That the effect of the arbitrary dead line along the pickets' path is that of coercing and intimidating all employers of A. F. of L. labor not involved in the controversy who have previously and customarily enjoyed business contacts and relations with the picketed place of business or who desire to establish such business relations with the picketed place of business or establishment. Such employers fear and have reason to fear labor troubles of their own with repercussions against or injury to their own business should they insist upon their A. F. of L. labor "crossing the picket line" to deliver goods, wares, merchandise, material, equipment or supplies or to render services to the picketed place of business or employment. That the result in this case was as above set forth.

J. That a large percentage (approximately 90 per cent) of the suppliers of goods, wares, merchandise and services essential and necessary for the conduct of the hotels have stopped making delivery at the hotels.

That said suppliers of goods, wares, merchandise and services have no dispute with the hotels and their A. F. of L. employees have no dispute with the hotels.

K. That the effect of the arbitrary dead line along the pickets path is that of intimidating and coercing the employer, the Plankinton House Company.

L. It also serves the purpose, and has the effect, in many instances, of intimidating and coercing those of the public who have contracted for banquets or conventions to be held at the picketed hotels or who are about to contract for same, to cancel such contracts or refrain from entering into same.

M. Such picket line, given the status, force and use above described, has the effect, and is an instrumentality to coerce and intimidate the employees of the Plankinton House Company with respect to their right to work and to freely select their bargaining agency without interference.

XIX.

That the picketing commencing January 13, 1941, and which continued thereafter was engaged in with full knowledge upon the part of the unions named in paragraphs 2 to 8 inclusive of these findings and the responsible officers and agents thereof, that A. F. of L. members would not cross the picket line and would not be permitted to cross. Such result was anticipated and expected and known to said unions and the responsible officers and agents thereof.

Such result is the natural and probable consequence of the rule of "not going through a picket line" when tested in the light of the facts established and the purpose and object of affiliation and inter-affiliation of "locals" with central bodies designed to produce such results.

XX.

That during the period May 13, 1940 to January 13, 1941 the unions designated in findings 2, 3, 4, and 6, and through the functioning of the central bodies named in findings 7 and 8 were able to give and did give to the advertising permitted by the qualified stay, an approximation of the full force and effect of a picket line with all of the significance attached thereto as set forth in finding 18.

XXI.

That all of the activities set forth in these findings have been done knowingly, deliberately and intentionally (the elliptical picketing which occurred on January 13, 1941 excepted) with the knowledge, consent and approval, encouragement, cooperation and planned united action of the organizations named in paragraphs 2, 3, 4, 6, 7, and 8 of these findings and the attorneys and responsible officers and agents thereof.

XXII.

That all of the activities of the unions designated in paragraphs 2, 3, 4, 6, 7, and 8 of these findings and the responsible officers and agents thereof have caused the Plankinton House Company incalculable injury and damage.

XXIII.

None of the unions named in findings 2 to 6, inclusive, took any of the affirmative action required by subdivisions (a) and (b) of paragraph 2 of the order of the Board as sustained and enforced by the judgment of this court until July 28, 1941, namely, after the filing of this court's decision of July 8, 1941, in the instant contempt proceeding, that is to say, none of said unions prior to said July 28, 1941 posted notices to comply with the judgment of this

court dated May 14, 1940 or notified the Board in writing that any steps had been taken by any of said unions to comply with the order of the Board as enforced by the judgment of this court, as set forth in provision 2(a)(b) o. said order and judgment.

Shortly after the filing by this court of its memorandum decision of July 8, 1941 in the instant contempt proceeding, and on or about July 14, 1941 said unions, upon the advice of their attorneys discontinued all picketing and other activities in connection with the controversy at the Plankinton House. The affirmative action first mentioned was taken on July 28, 1941, two weeks later.

XXIV.

A. That the unions named in findings 2 to 6, inclusive, went out on strike on November 2, 1939, to enforce their demand against the Plankinton House Company that said company sign a contract recognizing said unions as the "collective bargaining agencies" of all of the hotel employees of said company subject thereto, and that such contract, contrary to an arbitration award with respect thereto, contain an "all union agreement" clause without first submitting the latter demand to the vote of the employees of said company in the appropriate bargaining units by a secret referendum ballot to be conducted as required by law by the Wisconsin Employment Relations Board.

B. That at the time of said strike the Plankinton House Company was willing to recognize the demands of said unions with respect to recognition of same as the representatives of said employees for purposes of collective bargaining and signified its willingness to be bound by the arbitration award and to enter into an all-union agreement if the employees in the appropriate collective bargaining

units voted affirmatively for the all-union agreement, pursuant to the terms of the arbitration award by such secret ballot referendum to be conducted by the Wisconsin Employment Relations Board.

C. That the strike from its inception was directed against the Plankinton House Company to enforce the all-union agreement demand.

XXV.

That the strike resulted in the formation of the union known as the Independent Organization of the Plankinton House Company Employees, which union was on March 6, 1940 certified by the Wisconsin Employment Relations Board as the exclusive bargaining representative of all the employees of the Plankinton House Company for purposes of collective bargaining.

That this certification by the board and all of the proceedings had in connection therewith were reviewed by this court upon petition of the same petitioners that sought review of the order of the board dated February 15, 1940 in this case of unfair labor practices. Said review proceedings are the representation cases referred to in paragraph 10 of these findings. This court in its judgment sustained, approved and confirmed all proceedings of the board in connection with said representation cases including the final certification of the board dated March 6, 1940.

XXVI.

A. Ever since the certification by the board referred to in the preceding findings, the Plankinton House Company (and its employees) has recognized and dealt with the independent organization of the Plankinton House Company employees as entitled to recognition as the exclusive collective bargaining agency of all of the employees of said company for purposes of collective bargaining.

B. The above named independent union is the only union which the Plankinton House Company has been able to lawfully recognize as the representative of its employees for the purposes of collective bargaining since the judgment of this court rendered in May, 1940, sustaining, approving and confirming the Board's certification and proceedings in the representation review proceedings.

XXVII.

A. All of the activities, set forth in these findings, of the unions named in findings 2, 3, 4, and 6 and of the responsible officers and agents thereof, when weighed in the light of all the circumstances and the real nature of the methods employed, have materially exceeded the bounds of peaceful picketing, persuasion or advertising, but rather have as their true object, intent and purpose the compelling and coercion of the employer Plankinton House Company to meet the demands made upon said company at the inception of the strike.

B. All of the activities set forth in these findings of said unions named in findings 2, 3, 4, and 6 and of the responsible officers and agents thereof, when weighed and considered in the light of the actual facts as above stated, are part of the same plan and campaign directed against the Plankinton House Company as an employer and not against the company's employees.

C. All of the activities set forth in these findings of the unions named in findings 2, 3, 4, and 6, and of the responsible officers and agents thereof are for an unlawful purpose in that they are directed at compelling the Plankinton House Company, as an employer, to meet demands which the said company may not lawfully accede to. The activities of the union organizations named in findings 7 and 8 and as hereinbefore stated were resorted to by them

for the purpose of supporting and aiding said other unions, namely, those named in findings 2, 3, 4, and 6, in the attainment of the purposes and objectives sought by the latter.

XXVIII

A. The campaign of said unions named in findings 2, 3, 4 and 6 was also characterized at the outset by violence, force and continuously threatening and other unlawful conduct which has since been continuously augmented and supplemented by intimidation and coercion in maintenance of an unlawful boycott.

B. The campaign from its inception has been one of a continuously coercive thrust calculated to engender fear.

C. In all probability violence, threats, force, coercion and intimidation will be engaged in at any time that conditions are favorable thereto.

XXIX.

The unions named in paragraphs 2, 3, 4, and 6 of these findings and the cited officers thereof, deliberately, intentionally and wilfully violated and disobeyed certain requirements of the judgment of this court, dated May 14, 1940, as affirmed by the supreme court of this state, by deliberately planning and intentionally committing the acts and conduct herein found to be a violation thereof as follows:

A. The activities and conduct set forth in and referable to findings 12 and 18 in violation of the cease and desist provisions of the judgment 1 (a), (b), and (c);

B. All activities and conduct from May 17, 1940 to January 13, 1941, referable to the situation set forth in finding 20 in violation of the cease and desist provisions of said judgment 1 (c);

and that in committing such violations of said judgment the said unions and the cited officers thereof did not act in good faith.

XXX.

That the unions named in findings 2, 3, 4, and 6 and the cited officers thereof, prior to July 28, 1941 (finding 23) deliberately and intentionally violated and disobeyed certain requirements of the judgment of this court dated May 14, 1940, as affirmed by the supreme court of this state, by failing to comply with the affirmative action requirements of said judgment, 2 (a) and (b), and that in so doing the said unions and the cited officers thereof (except International Union Operating Engineers Local No. 311 and its cited officers) did not act in good faith.

XXXI.

That the acts and conduct herein found to constitute a violation of said judgment were calculated to and actually did defeat, impede and prejudice the rights and remedies of the petitioner, the Wisconsin Employment Relations Board, having the right and duty to prosecute these enforcement proceedings and have caused and are causing incalculable loss and injury to the Plankinton House Company.

XXXII.

That of the unions named in findings 2, 3, 4, 5, and 6 of these findings, the union named in finding 2 (Hotel & Restaurant Employees' International Alliance Local No. 122, and its cited officers) were the ruling force.

XXXIII.

The Plankinton House Company has advised the court and counsel that said company will not press any claim for any indemnity award at this time against the unions

and their officers for any damages which it has suffered, although substantial, stating that it does so to avoid any possible imposition of such financial burden by means of assessments to be levied against the working members of the union and, therefore, reserves, without waiving, any such claim.

XXXIV.

International Union Operating Engineers, Local No. 311, has not been guilty of any wilful or contumacious conduct. Its failure to comply with the affirmative action requirements (subd. 2) of the Board's order and the court's judgment is of minor weight or consequence because full charge and control of the picket line and other activities in question rested with Employees' Local Union No. 122 and the unions mentioned in findings 3, 4, and 6, and their officers and agents in charge of the campaign and all methods used therein.

XXXV.

Wisconsin State Federation of Labor and Federated Trades Council of Milwaukee, and the officers thereof, have not been guilty of any wilful or contumacious conduct in respect of activities on their part as hereinbefore found. Their active connection with the controversy in question also ended when the unions named in findings 2, 3, 4, 5, and 6 complied with the Board's order of February 15, 1940 and the court's judgment with respect thereto, as stated in finding 23.

And as

CONCLUSIONS OF LAW

it is adjudged and determined:

1. That the order of the Wisconsin Employment Relations Board dated February 15, 1940 and enforced by the decree of this court did not expire one year after it was

made by reason of any provision in subsec. (4) of section 111.07, Wisconsin Stats. The one-year limitation stated therein is referable only to the suspension of "rights, immunities, privileges or remedies granted or afforded by this chapter", meaning Chapter 111, the Employment Peace Act of Wisconsin.

2. (a) That the conduct and activities set forth in, and referable to, findings 12, 18 and 20 constituted an unlawful boycott prohibited by said order of the Board as enforced by the order of this court and the Supreme Court of this state, and were for an unlawful purpose and violated the provisions of sec. 111.06 (2) (f) and (g) of the Employment Peace Act of Wisconsin.

(b) That the picketing set forth in finding 12 was used or employed as an instrument of boycott and for the perfecting and maintaining of same.

3. That the unions named in findings 2, 3, 4, and 6, and the cited officers thereof, must be and are adjudged guilty of contempt for their wilful and contumacious non-compliance with the "cease and desist" provisions of the said judgment 1 (a), (b) and (c).

4. That Hotel & Restaurant Employees' International Alliance Local No. 122, and its cited officers, Phil L. Valley, John Alexander and Jack Heisdorf, should be and are adjudged guilty of contempt by reason of their wilful and contumacious non-compliance with the affirmative action requirements (Subd. 2 of the board's order of February 15, 1940 and the court's judgment with respect of the same) at all times between the final decision of the Supreme Court of this state rendered January 7, 1941 and July 28, 1941 when said Local Union No. 122 and its officers complied with said requirements.

5. The unions named in findings 3, 4, and 6, namely, Laundry Workers Local No. 174, Bartenders Local No. 64

and Milwaukee Building & Construction Trades Council, and their officers, having joined with said Local Union No. 122 named in finding 2 in full and fair compliance on July 28, 1941 with said affirmative action requirements (Subd. 2 of said order of the Board and the court's judgment), said three unions first mentioned, namely, those named in findings 3, 4, and 6 and their officers, are not guilty of wilful and contumacious conduct in the matter and respect set forth in this conclusion No. 5.

6. Wisconsin State Federation of Labor and Federated Trades Council of Milwaukee, and their officers, were under no legal duty to comply with said affirmative action requirements, namely, Subd. 2 of the Board's order of February 15, 1940, and the court's judgment with respect of the same. They are guilty of no contempt in this respect.

7. Wisconsin State Federation of Labor and Federated Trades Council of Milwaukee, and their officers, are guilty of no contumacious conduct as stated in finding 35 in respect to activities on their part. They are guilty of no contempt in connection with said activities.

8. International Union Operating Engineers, Local No. 311, and its officers, are not guilty of any contempt in any of the respects mentioned in the findings herein.

9. Said International Union Operating Engineers, Local No. 311, Wisconsin State Federation of Labor and Federated Trades Council of Milwaukee, and each and all of the officers and agents of said organizations, are entitled to judgment dismissing the petition as to them without costs.

10. Under the circumstances stated in finding 33, no indemnity award will be made against the contemnors named in conclusions of law numbered 3 and 4 and no testimony taken with respect to the establishment of the amount thereof.

11. The instant proceeding is one for civil contempt, the primary objective of which is to compel obedience to the order of the Board and the decree of this court as affirmed without change or modification by the Supreme Court of this state.

12. For the reason stated in conclusion 11, and the contemnors named in conclusions of law numbered 3 and 4 having complied with said order and decree, all in accordance with paragraphs 1 and 2 of the memorandum decision of the court filed herein on July 8, 1941 (made part hereof), which compliance occurred at the times stated in finding 23, it is deemed just and equitable, and accordingly adjudged, that the imposing of sentence upon said contemnors should be and is suspended.

Let judgment be entered accordingly.

Dated August 2nd, 1941.

By the Court:

Gustave G. Gehrz,
Circuit Judge.

No. 153

January Term, 1941.

State of Wisconsin: In Supreme Court:

Wisconsin Employment Relations Board,
Respondent,
v.
Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 225, etc.,
Appellant.

Appeals from a judgment and an order of the circuit court for Milwaukee county: Charles L. Aarons, Circuit Judge. **Affirmed.**

Petition by the Wisconsin Employment Relations Board against Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 225, etc., under subsec. (7) of sec. 111.07 Stats. 1939, for enforcement of an order of the Board requiring the union to "cease and desist" from "unfair labor practices" found by the Board to have been committed by the union and its officers. From a judgment confirming the order and adjudging its enforcement, the union appeals. From an order punishing the officers of the union for contempt of court for disobedience of the judgment the officers appeal.

Some evidentiary facts about which there is no dispute and make more readily apparent the issues will be here stated. The Golden Guernsey Dairy Co-operative, referred to herein as "the company", is a corporation engaged at Milwaukee in the wholesale and retail dairy business, buying and selling milk, cream and other dairy products and producing and processing some of its products. It sells its merchandise by truck and its drivers are paid commissions on their sales. The Milk & Ice Cream Drivers & Dairy Employees Union, Local 225, referred to

herein as "the union," is a labor union affiliated with the American Federation of Labor. It has about two thousand members engaged as drivers, salesmen and other employees in the ice cream and dairy business at Milwaukee. The company had for several years had an all-union contract with the union which was about to expire upon notice, but to continue for another year unless notice of discontinuance was given. The union was the bargaining agent for the company employees. On giving notice of the termination of the existing contract the company informed the union that it would enter into a new contract with the union, but would not enter into a contract containing an all-union provision unless such provision were desired by three-fourths of its employees as required by sec. 111.06 (1) (c) Stats., and requested cooperation by the union in procuring a vote on that question. The company petitioned the plaintiff Board to hold such referendum, which was held, and of the 192 employees voting the vote was 118 against and 74 for the all-union provision. One hundred ninety-four of the company's employees were members of the union and comprised more than a majority of the company's employees. When the result of the referendum was certified by the Board to the company it again informed the union that it would negotiate a new contract with the union and that it would accept the contract existing between the union and other employees in the dairy business in Milwaukee with the all-union provision eliminated, which all other contracts contained. A bargaining meeting was arranged but prior thereto the union advertised in the city newspapers that it would not enter into a contract with the company unless the contract contained an all-union provision. Before the time of this meeting was fixed the employees of the company had formed an organization named "The Independent Association of Golden Guernsey Employees"

hereinafter referred to as "the independent union." This independent union notified the company that it desired to be the bargaining agent of the employees. At the meeting referred to the company informed the union of this demand and suggested that the matter of which union should represent the employees should be decided by a vote of the employees under the supervision of the Board but until such vote was taken it would recognize the union as the representative of its employees. The meeting between the company and the union for negotiations was held on April 3, 1940. The union there presented a contract for the company's acceptance which contained an all-union provision and price, hour, vacation and sick leave provisions far in excess of those in force in the contract with all the other employers in the dairy business in the city and so exorbitant as would make the aggregate cost to the company for the ensuing year, on the basis of the company's employment experience of the previous year, $134,500 and in excess of the company's entire profits of $92,265 for that year. The company offered some concessions but said that it would not accept an all union contract because of the vote of its employees and the prerequisite of the statutes for a vote of three-fourths of its employees to authorize such a provision. The night after this meeting a special meeting of the members of the union was held to take up the matters between the union and the company. At this meeting certain questions were submitted by secret ballot to the members present. Question 3 was: "Do you favor a strike at the Golden Guernsey Company if it does not sign the all-union agreement which the rest of the industry has agreed to?" The vote was 553 "Yes" and 2 "No." By like vote taken at the meeting the executive board of the union was professedly authorized to call a strike. After this meeting adjourned the executive board met the same night and decided to call a strike against the com-

pany. The committee included the president, vice president, secretary-treasurer and other members of the union. The president testified on the hearing before the Board that the committee decided to declare the company unfair; to notify its employees and ask them not to go to work; to give each employee a copy of the union by-laws, which by their terms obligate members on call of strike by the executive committee to cease work, and subjects a member who fails to do so to fine, suspension or expulsion at the discretion of the executive committee; to ask them to help advertise that the company and its employees "would be unfair." A copy of the by-laws was given next morning to each employee member. Of the company employees twenty signed a writing refusing to go to work. The union had signs prepared "Golden Guernsey Company unfair to organized labor. Local 225. Please do not patronize." "Golden Guernsey and its employees unfair to organized labor. Please do not patronize." Other signs were made up as follows: "2000 milkmen cannot be wrong; please do not patronize Golden Guernsey Dairy employees, Local 225." "Help 2000 milkmen." "2000 milkmen from Local 225 A. F. of L. beg your support. Please do not patronize Golden Guernsey employees." Signs were posted on a hack driven about the city: "We ask you, please do not patronize the Golden Guernsey Dairy employees." All these signs were "on the street" until the trial. Picketing of the plant as arranged by the executive committee of the union began early on April 5th.

Pursuant to the plans of the executive committee of the union extensive like advertising was carried on by the union throughout the city, through newspapers, by men carrying signs, by automobiles following delivery wagons of the company, by a man on a bicycle. The gist of the matter thus advertised was that the company and its employees were unfair to organized labor. Pickets

carried such signs at the company's plant and at some places where its products were delivered.

From the evidence before it the Board made findings as to the activities of the union which are more specifically referred to in the body of the opinion. Other facts relating to these activities will be there stated so far as deemed material to our rulings.

Fowler, J. The proceedings involved were duly instituted by the Wisconsin Employment Relations Board upon the petition of the Golden Guernsey Dairy Co-operative against the Milk & Ice Cream Drivers & Dairy Employees Union, Local 225, under Ch. 111 Wis. Stats, 1939, hereinafter referred to as "the act," enacted in furtherance of "the public policy of the state as to employment relations and collective bargaining." Secs. 111.06 (1) and (2) of the act declare "What are unfair labor practices." Sec. 111.07 by subsec. (1) provides that any controversy concerning such practices may be submitted to the Board; by subsec. (4) that after hearing the Board shall "make and file its findings of fact" and "its order," and that the order may dismiss the charge or require the person complained of to cease and desist from an unfair labor practice found to have been committed; and (7) provides that if a person against whom an order runs fails or neglects to obey it the Board may bring an action in the circuit court to enforce it. In the instant case the Board made an order against the union, the union did not comply with it, and the Board brought an action to enforce it. The union asked the court to set aside the order. The circuit court sustained the order and entered its judgment of enforcement, and from that judgment the union appeals.

After the judgment of the court was entered and notice of its entry given to the union, the Board by petition to the circuit court charged that the union, its officers and certain members wilfully and contumaciously committed acts in

violation of provisions of the court's judgment and asked that they be dealt with as in contempt of the court. The court by order required the defendant union to show cause why it should not be so dealt with. The union by answer denied in part committing the acts charged and admitted them in part and claimed justification of the admitted acts under the free speech clause of the United States Constitution and the XIVth Amendment. Upon hearing had before the judge who rendered the judgment, the president, vice-president and secretary of the union were adjudged guilty of contempt of court and punishment therefor was imposed. The defendant officers so adjudged appeal to this court. The two appeals were argued and submitted together and are treated in this opinion.

The findings of fact made by the Board on which the order involved is based are serially numbered from 1 to 19, inclusive. The union in its brief assigns as error that the court erred in sustaining these findings of fact because they are not supported by "credible and competent evidence." The credibility of the evidence was for the Board to determine. No incompetent evidence is pointed out, unless the claim of incompetency is that the evidence is not "substantial" or "more than a scintilla." It is conceded that to be of probative force to support findings evidence must be of this nature. The brief does not point out specifically any of the 19 findings as not supported by the evidence. The findings of the Board, if supported by credible and competent evidence are conclusive. Sec. 111.07 (7) Stats. The party on whom the burden of proof rests is required to sustain the burden by a clear and satisfactory preponderance of the evidence. Sec. 111.06.(3). We will first consider whether the evidence supports the facts found that fall under paragraphs (f) and (g) of sec. 111.06 (2) Stats.

Sec. 111.06 (2) (f) declares it an unfair labor practice for an employee to do any act "To hinder or delay by mass

picketing . . . the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with the free and uninterrupted use of public roads, streets'' etc.

Sec. 11.06 (2) (g) declares it an unfair labor practice for employees ''to combine or conspire to hinder or prevent by any means whatsoever the obtaining, use or disposition of materials, equipment or services.''

Sec. 111.06 (3) of the act provides that ''it shall be an unfair labor practice for any person to do or cause to be done . . . in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by subsecs. (1) and (2) of this section.'' (Sec. 111.06.)

Therefore if the Board found on sufficient evidence that the union ''caused to be done'' any acts in violation of pars. (f) (g) above stated it had power to issue an order requiring the union to cease and desist from the commissions of those acts, and its order so far as it required the union to cease and desist from such acts was valid and the judgment of the court was not in error in confirming such cease and desist order.

That the union ''caused to be done'' the picketing and all other acts recited in the statement of facts preceding the opinion is beyond dispute. Therefore such of those acts as constituted unfair labor practices the Board properly required the union to cease and desist from doing and the court properly adjudged to be enforced.

The Board by par. a of its finding of fact numbered 15 found that beginning early April 5th, while the company was loading its delivery trucks a picket line formed and passed to and fro in front of the company's plant. The number in line during the loading period frequently numbered from 40 to 95. The pickets marched slowly two by

two, back and forth, with short steps and close together. Policemen present were forced on an average of eight to ten times each morning to break or open this line to permit entrance and emergence of the trucks. The interference and delay thus caused made it necessary for the company to employ additional help to approximate its usual loading time. After the delivery trucks left the plant, the number of pickets decreased, but picketing continued throughout the day and into the night. It decreased somewhat after commencement of the proceeding before the Board, but with such decrease all these acts continued down to the time of trial. By this finding the Board in effect found that by mass picketing the union hindered the pursuit of lawful work of the company and that it obstructed and interfered with entrance and egress to and from the company's plant.

By par. b of finding 15 the Board found that the authorities sent by the union to follow the company's delivery trucks to their places of delivery on many occasions cut in ahead of the trucks, impeded their progress and prevented their proper parking in making deliveries and generally interfered with the free and unobstructed use of the streets by the trucks and endangered the safety of the drivers and the property of the company. It also found that at places of delivery there was frequent interference by the picketing carried on by the occupants of the automobiles with the free and unobstructed use of the sidewalks by the company drivers. These findings of the Board are clearly supported by the evidence and constituted such hindrance of the pursuit of lawful work and such obstruction of ingress and egress to and from the plant and of the use of the public streets and sidewalks as to constitute violations of both pars. (f) and (g) of sec. 111.06 (2) Stats. as to warrant the cease and desist order of the Board and of the judgment of the court so far as they pertain to such practices. This is sufficient to warrant affirmance of the cease and

desist orders of the court, as everything else in the general terms of the judgment, all being as to things which the union had no right to do, did not harm or prejudice the union. The only paragraph of the judgment that requires the union to cease and desist from doing any specific acts is par. a of division 1. That paragraph requires the union, its officers and members to "cease and desist from coercing or attempting to compel . . . (the company) by picketing its plant, obstructing the ingress to or egress from its plant, interfering with its delivery trucks or the drivers of the same, picketing the residences or places of business of any of the complainant's customers, exercising any form of coercion toward or intimidation of any such customers, or in any other way to make or enter into a labor contract with the respondent (union) containing an all-union or closed shop provision." The Board and the court specifically found that the things mentioned were done for the ultimate purpose of compelling the company to enter into an all-union contract. The union contends that there is no evidence to support this inference of fact but we consider that the inference is warranted. It is to be noted, as held in **Century Building Co. v. Wisconsin Employment Relations Board**, 235 Wis. 376, 382, 383, 291 N. W. 305, that, although the Board's findings must be supported by a clear and satisfactory preponderance of the evidence, when a case gets before the circuit court for review the Board's findings must be sustained if there is any credible evidence to support them. Par. 1 a of the judgment plainly implies that the union must cease and desist from doing the specific things mentioned therein, and being in contravention of pars. (f) and (g) of sec. 111.06 (2) Stats. the union could be and was properly required to cease and desist from doing them.

The union contends that the picketing done at the places of business of the company's customers was not aimed at the owners of these places and that these places therefore

were not picketed, but that the picketing involved was only of the trucks and their drivers. We regard this contention as sophistry. In our opinion it constituted a picketing of the places of business before which it occurred. Counsel also claim that the acts done did not constitute coercion or intimidation of the customers. That it did not constitute putting in fear of physical harm is true, but it is plain that it did constitute coercion.

We do not find it necessary to consider any other provisions of the cease and desist provisions of the judgment except pars. c, e and h. All of the cease and desist provisions are set out in the margin.

It Is Therefore Ordered and Adjudged that the respondent . . . its officers, agents, members and successors, do and shall—

1. Cease and desist from—

a. Coercing or attempting to compel the complainant, Golden Guernsey Co., a corporation (hereinafter referred to as the complainant) by picketing its plant, obstructing the ingress to or the egress from its plant, interfering with its delivery trucks or the drivers of the same, picketing the residences or places of business of any of the complainant's customers, exercising any form of coercion toward or intimidation of any such customers, or in any other way, to make or enter into a labor contract with the respondent containing an all union or closed shop provision.

b. Coercing in any way or attempting to compel the complainant to interfere with its employees in the exercise of their legal right to refrain from being subject to a labor contract containing an all union or closed shop provision.

c. Publicly asserting in any way that the complainant is unfair to organized labor or to the respondent union, unless such charge is based upon some reason other than that the complainant has declined to enter into a labor contract with the respondent containing an all union or closed shop provision.

d. Intimidating in any way the employees of the complainant in the exercise of their legal right to work for the complainant without molestation.

e. Hindering by threats or intimidation of any sort the disposition by the complainant of its merchandise or services to its customers, and the obtaining, use or disposition by the customers of its merchandise or services.

f. Engaging in or conducting any secondary boycott of any customer of the complainant.

g. Exercising any form of coercion toward or intimidation of any of the complainant's customers.

h. Asserting to any of the complainant's customers that the complainant is unfair to organized labor or to the respondent union because the complainant has declined to enter into an all union or closed shop labor contract with the respondent.

It will be observed on inspection that all but c, e and h are general in their terms. None other mentions any specific act. It is contended that the acts done by the union respecting the matters covered by the other provisions did not constitute "coercion," or "intimidation." If not, then these acts are not under the ban of the judgment. As to c and h they ban asserting that the company is "unfair to organized labor or to the respondent union." Some of the placards proclaim the company as "unfair to organized labor, Local 225." Because of this we consider e and h proper. There may be some question, at least there is some contradiction in the authorities, as to whether doing or refusing to do certain acts render an employer "unfair" but there certainly can be no controversy over the proposition that an employer is not "unfair" when his only act is refusing to do and refraining from doing what the law forbids him from doing. All the company has done in this case, if the evidence produced by the company is believed, and the Board and the trial court properly believed it, is to refuse to sign an all-union contract and to refrain from trying to influence its employees in respect to joining or not joining the independent union or the defendant union, and to refrain from interfering with its employees in respect to their choice of a bargaining representative or their attitude as to an all-union contract. It has done nothing proscribed by sec. 111.06 (1) Stats. which declares what shall constitute unfair labor practices by an employer. Par. (c) of subsec. (1) of said section by necessary implication proscribes an employer's entering into an all-union labor contract unless three-fourths of his employees constituting a collective bargaining unit have voted therefor. The Board found and the court confirmed that the company "has not dominated or interfered in any way with any of its employees in the exercise of their legal rights respecting organization or collective bargaining or any rights re-

ferred to" in Ch. 111 relating to "Employment Relations." This finding is supported by the evidence.

Counsel cite recent decisions of the United States Supreme Court to the proposition that it is proper in labor controversies to placard that an employer is unfair: **Lauf v. E. G. Shinner & Co.**, 303 U. S. 323, 82 L. Ed. 72; **Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc.**, ... U. S., ..., 85 L. Ed. (Adv. Op. #2) 91; **Fur Workers' Union, Local 72, v. Fur Workers' Union**, ... U. S. ..., 85 L. Ed. 47. We find nothing in these cases bearing on the proposition here involved. It merely appears from them that signs of the nature stated were involved therein, but whether they were truthful or untruthful is not discussed or mentioned. It may be conceded that if an advertisement charging unfairness gives the facts on which it is based in connection with the statement of unfairness this would not of itself be an improper labor practice. But under the facts of this case including the ban against publishing the bald statement of unfairness in the cease and desist order of the Board and in the judgment of the court was proper.

Par. e of the judgment bans "hindering . . . by threats the obtaining (or) . . . use by the company's customers of its merchandise or services." So doing is in contravention of par. (g) of sec. 111.06 (2), "combining to hinder or prevent by threats . . ." or "to combine to hinder or prevent by any means whatsoever the obtaining, use or disposition of materials, equipment or services." As to threats, one of the wholesale customers who protested against picketing in front of his store was told by a picketer that the union would so picket as long as he took milk from the company drivers, and the picketing itself was plainly a threat to that effect. We consider that there was enough in the case to warrant inclusion in the cease and desist portion of the judgment the use of threats against

customers by the picketers. Besides, if there were only isolated instances of such threats, no harm results to the union from including the ban in the judgment, as confessedly the union has no right so to threaten.

We consider that we have covered sufficiently the contents of the cease and desist order of the court. If those provisions are in point of law such as the court might properly enter, those provisions of the judgment of the court must be sustained. The only contention of the appellant that those provisions are erroneous is that they violate the free speech and free press provisions of the United States Constitution and are therefore prohibited by the XIVth Amendment. This contention is based upon three recent decisions of the United States Supreme Court, **American Federation of Labor v. Swing**, ... U. S. ..., 85 L. Ed. 513, **Thornhill v. Alabama**, 310 U. S. 88, ... L. Ed. ... and **Carlson v. State of California**, 310 U. S. 106, 84 L. Ed. 668. It is true that cases of state courts are cited pro and con upon this proposition, also cases of inferior federal courts. But it is in our opinion entirely useless to cite or to consider any of these cases or any cases of the United States Supreme Court except such as have been rendered by the court as now constituted. The only cases decided by that court as now constituted that appear to us to afford any light upon the three next above mentioned are the flag case, **Minersville District v. Gobitis**, 310 U. S. 589, ... L. Ed. ..., and the recent case of **Milk Wagon Drivers' Ass'n. v. Meadowmoor Dairies**, ... U. S. ..., 85 L. Ed. 497. These cases indicate that there are limits beyond which the present court will not go to invalidate police regulations of the state because violative of the rights of religious freedom and freedom of speech and to reverse factual findings of state courts under the common law. The **Meadowmoor Dairies Case**, supra, it is true goes upon the proposition that the act involved had a "background" of

extreme violence. The picketing involved was claimed to be lawful under the rule of the **Carlson** and **Thornhill Cases.** Par. 4 of the syllabus to the opinion in the **Meadowmoor Case** sufficiently indicates the holding and such applicability as it has to the instant case:

> "Picketing which in itself is peaceful may be coercive when set in a background of violence."

With like reason may it be said that picketing which is unlawful is not justified on the ground that it is a proper exercise of the right of free speech. Par. 5 of the syllabus reads:

> "The Supreme Court of the United States cannot say that a finding of a state court that a momentum of fear generated by past violence may survive even though future picketing may be wholly peaceful so contradicts experience as to warrant rejection."

With like or greater reason, the Supreme Court of the United States may not say that the statutory provisions above referred to contained in pars. (f) and (g) of sec. 111.06 (2) Stats. so contradict experience and reason as to warrant rejection.

It is said in **American Furniture Co. v. I. B. of T. C. & H. of A.**, 222 Wis. 367, 268 N. W. 250, that the terms of a statute "cannot be stretched to permit a union to enforce by picketing demands which the employer may not lawfully accede to." No more may this be done by court decisions. Picketing that so aims is unlawful although it is free from violence. That is just what the picketing here involved is carried on to enforce. It is carried on to enforce the union's demand that the company enter into an all-union contract, and that as heretofore pointed out the company cannot do because such contract cannot under sec. 111.06 (1) (c) be entered into unless voted by three-quarters of its employees. The case of **Senn v. Tile Layers'**

Union, 301 U. S. 468, 81 L. Ed. 1229, is particularly relied on by appellant to support the instant picketing, because of its upholding of the picketing there involved because it was peaceful. But the picketing there involved was held to be lawful. The opinion plainly implies that had it been unlawful, it would not have been justified though free from violence, and the minority of the court was of opinion that the picketing was unlawful and therefore not justified notwithstanding its freedom from violence. As to this see further infra.

We find nothing inconsistent between the provisions of the cease and desist order covered by Pars. (f) and (g) of sec. 111.06 (2) and the **Thornhill, Carlson** and **Swing Cases**, on which the union so confidently relies. In none of these cases was the picketing involved carried on for unlawful purpose. No statutory violations were involved in the **Swing Case**. The opinion of the court, p. 514, L. Ed. (Adv. Op.) states the issue to be merely, "is the constitutional guaranty of freedom of discussion infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute?" It is also stated in the opinion, p. 515, L. Ed. Adv. Op. No. 8:

> "All that we have before us, then, is an instance of 'peaceful persuasion' disentangled from violence and free from 'picketing en masse or otherwise conducted so as to occasion 'imminent and aggravated danger.'"

We should not extend the rule of that case beyond the point at which the court itself stopped. Here we have violations of the statutes above mentioned as to which no question of constitutionality is raised.

All that was decided in the **Thornhill Case**, reducing it to its lowest terms, is, that the statute there involved was void because it forbade picketing that was free from vio-

lence and in which the pickets only said that "they were on strike and did not want anyone to go up there to work." The picketing involved in the **Thornhill Case** was free from violence but picketing is not lawful merely because it is free from violence. It is said by the United States Supreme Court in the **Senn Case**, supra, that picketing to be peaceful must not only be free from violence, but there must be "absence of any unlawful act. . . . It (peaceful picketing) precludes any form of physical obstruction or interference with the plaintiff's business." As above pointed out, there was here physical obstruction and physical interference with the company's business, both by mass picketing which is expressly excluded from consideration in the **Thornhill Case** and which is there conceded to be subject to inhibition when properly particularized, and by obstruction to and interference with ingress and egress and use of streets, the latter to such an extent as to endanger safety of persons and property.

The **Carlson Case** involved violation during a strike of an ordinance by picketing, but it seems to be sufficiently distinguished from the instant situation by the statement in the opinion, p. 110, that—

> . . . "During this period (of picketing, 7:30 to 9 A. M.) vehicles and persons passed freely without any molestations or interference through the picket line from the highway to the project and from the project to the highway, and the traffic of persons and vehicles along the highway was not obstructed."

As to violations of pars. (f) and (g) of sec. 111.06 (2) Stats. the instant case is clearly distinguished. As to the sign displayed, "This job is unfair to C. I. O." it is comparable to the sign "The Golden Guernsey Company is unfair to organized labor and Local 225," but the case is without evidence, as here, establishing that the employer was in fact not "unfair." The opinion does not mention the mat-

ter of unfairness, or whether the signs conveyed true
false statements.

The court in the **Senn Case**, supra, in saying p. 47
"Senn did not contend that it was untruthful to chara
terize him as 'unfair' if the requirement that he refra
from working with his own hands was a lawful one,
plainly implies that one charged with being "unfair" ma
prove the fact to establish that he is not unfair, and th
if he so establish to placard him as unfair is unlawful. T
assert that one is unfair to organized labor may proper
be adjudged to be an unfair labor practice where as he
the evidence shows that the assertion is false.

Since submission of the case appellant's counsel hav
by letter called attention to a per curiam decision of th
Supreme Court of the United States announced June 2
**Wohl and Platzman v. Bakery & Pastry Drivers & Helper
Union Local 802, et al.** The only pertinent part of th
decision reads: "Judgment Reversed, American Fed.
Labor v. Swing, decided February 10, 1941." As the ru
ing was based on the **Swing Case** entirely, it affords
additional support to the appellant's contention. As in th
Swing Case, no statutory provisions were involved an
the ruling rested upon common law. Reference to the ni
opinion of the New York Supreme Court, 14 N. Y. S. (2d
198, shows that the case was brought in equity to enjoi
the union from picketing in furtherance of a secondar
boycott. An injunction issued. Both the New York Appe
late Division and the Court of Appeals affirmed the ni
ruling. Neither wrote an opinion. Par. (g) of sec. 111.0
(2) Stats. declares a secondary boycott "an unfair labo
practice."

We believe the above sufficiently covers the claims o
appellant respecting errors affecting the judgment of th
court sustaining the Board's order, except the claim tha

the Board improperly rejected evidence offered by the union.

The rejected evidence was offered as of probative force in support of the union's contention that the company was "unfair" to organized labor. The items of rejected evidence will be briefly stated and our ruling given. (1) The president of the company was active in promoting the enactment by the Legislature of Ch. 111, Laws of 1939, and repealing the then existing Ch. 111 Stats., which resulted in the creation of the present and abolished the then existing Labor Board. We fail to perceive that this has probative force upon the question of the company's fairness or unfairness towards the union. (2) The secretary of the union was asked what arguments were presented at the meeting of the union on April 4th relating to the questions submitted to vote at that meeting. Objection to the question was properly sustained. (3) The president of the company was asked whether any complaints were made to him as to unlawful acts by any of the strikers and offered to show that none was made. The objection was properly sustained, and testimony properly rejected. (4) A question was asked whether a route foreman of the company had engaged in anti-union activities. Objection to it was properly sustained. (5) A question was asked whether employees quit their employment with the company because of domination by the company over the independent union. The objection was properly sustained.

As to the contempt matter, it seems not open to question that the appellants charged with contempt were properly adjudged guilty if they intentionally and knowingly violated any of the provisions of the judgment. It is said in **State ex rel. Attorney General v. Farekas**, 223 Wis. 356, p. 358, 269 N. W. 700:

"The order and judgment of the court finding the

defendant Farekas guilty of contempt must be sustained under the authority of State ex rel. v. Circuit Court, 98 Wis. 143, and John J. Jelke Co. v. Beck, 208 Wis. 650. The defendant acted in entire disregard of the court's order claiming that the code, under and pursuant to which the order was made was invalid and unconstitutional. The defendant flouted the court and contumaciously refused to abide by an order made by a competent court having jurisdiction over his person and the subject matter of the controversy. Whether the order was right or wrong, it was the duty of the defendant to obey it until relieved therefrom in some one of the ways prescribed by law."

Under the rule above stated it was the duty of the union and its officers and members to obey the provisions of the judgment of the court until they were reversed on appeal or by the trial court set aside, modified or declared to be no longer in force in some proper proceeding. Whether the provisions of the judgment were right or wrong in point of law is immaterial upon the proposition of obedience to them under the rule stated. We have first to determine whether the trial court in adjudging that the defendants charged with contempt intentionally committed acts in violation of those provisions.

The court found and it is not disputed that the union continued to picket the company's main plant after the rendition of the judgment and the service of notice of its entry and of its terms upon the defendant union each day from early in the morning to six o'clock at night by pickets working in regular shifts; that said picketing consisted of from two to five pickets walking the sidewalks in front of the Golden Guernsey plant, one of whom wears an apron bearing the legend front and back: "2000 milkmen from Local 225 beg your support. Do not patronize Golden Guernsey Dairy Employees." The same type of picketing was carried on during the same hours daily at the Golden

Guernsey ice cream plant and store located across the street from the main plant. The court also found that the union for the purpose of injuring the Golden Guernsey Company caused to be parked daily at or near an advertising sign of the Golden Guernsey Company in the form of an immense milk jug located on one of the main approaches to the city one or more automobiles from five to seven o'clock p. m. and having a sign thereon bearing the legend above stated. This practice was not begun until after the judgment of the court affirming the order of the Board was rendered.

The court further found that the union has continued to have the delivery trucks followed by automobiles, substantially as before entry of judgment, except on Sundays and with signs as next above stated. Picketing at the places of the wholesale customers at times of delivery also continued as before the judgment. One or two occupants of the cars walk before the customer's place of business carrying a sign as next above stated. The extent to which the union has continued its violation of the provisions of the court's judgment, and the results of such continued violations, is stated in two of its findings that are sustained by the evidence, as follows:

> "The union employed pickets to follow the wholesale route drivers of the Golden Guernsey while engaged in the delivery of milk to customers. Such practice has been persistent and continuous, except on Sundays; but it is not usually continuous throughout the entire route. Such following is usually a few car lengths behind the Golden Guernsey trucks, whose drivers in a number of instances have attempted to operate their trucks in such a manner as to cause their pursuers to lose sight of them. On one occasion a Golden Guernsey truck driver was pursued in Racine County at a speed of forty to fifty miles per hour by pickets, who, after overtaking the Golden Guernsey

truck, drive ahead of it in such a manner as to cause the driver of the latter to fear that his truck would be ditched. When the route driver of the Golden Guernsey reaches the customer's place of business one or two pickets engage in picketing the place of business of the customer, regardless of the position of the route driver's truck. The pickets who follow the route driver usually park their automobiles very close to the rear of the route driver's truck while the latter is delivering milk. This surveillance and following of the company's truck drivers on wholesale routes has continued and, in recent days, has been conducted with increased vigor and persistency." . . .

"The methods employed by the union in following the Golde Guernsey trucks tend to endanger public traffic and to impair the driving control of the Golden Guernsey drivers."

Other specific findings of fact were made by the circuit judge, none of which we deem it necessary to set out, because the facts above stated sufficiently show that the cease and desist order of the court was disobeyed by picketing at the plant, by following the company trucks and by picketing the stores of the wholesalers. The union contends that the facts stated did not constitute a violation of the order because the acts found were not aimed at the company or its customers but only at the drivers. The judgment banned the picketing, regardless of at whom it was aimed. The picketing at the plant was obviously a picketing of the company notwithstanding that the placards used subsequent to the entry of the judgment read "Golden Guernsey employees" instead of "Golden Guernsey Company." The mere device of pasting the word "employees" over the word "company" on these placards as was done, did not change the effect of the picketing of the plant of the company, or the picketing of the wholesale customers during the times of delivery. As stated in discussion of the main case, par. a of the cease and desist

portion of the judgment plainly required the union to cease and desist from picketing the company plant and the stores of its wholesale customers and so following the company trucks with automobiles as to endanger traffic or interfere with or obstruct the free use of the streets by the company trucks and drivers. Whatever else was involved in their acts did not obviate or evade the violations thus found.

The court further found that the president, vice-president and secretary-treasurer of the union, the persons charged with contempt of court, intentionally and deliberately planned and instigated the acts found to have been committed:

> "(a) in an attempt to exert compulsion upon the Golden Guernsey Company to enter into an all-union agreement with said Union; (b) in an attempt to exert compulsion upon the Golden Guernsey to interfere with its employes in the exercise of their right to freely select their own bargaining agency without interference in their right to refrain from being subject to an all-union agreement; (c) in an attempt to intimidate the employes of the Golden Guernsey in the exercise of their right to work for that company without molestation; (d) in an attempt to hinder by intimidation the disposition by the Golden Guernsey of its merchandise and services to its customers and the obtaining, use and disposition by its customers of its products and services; and for the purpose of causing such customers to cease buying and receiving the products and services of said company until such all-union agreement shall have been entered into between the company and its employees."

The court further found as bringing the proceeding within sec. 295.01 Stats. prescribing the procedure in contempt of court cases, that these acts "were calculated to and did defeat, impede and prejudice" the rights and remedies of the Board, who were the petitioners in the con-

tempt proceedings, who have the right and are charged with the duty to prosecute the instant enforcement procedure under Ch. 111 Stats. 1939, and that these acts have caused and are causing injury to the Golden Guernsey Company and to its employees.

Under these findings the conviction and sentence by the court was correct and must be affirmed unless the court erred in not granting a jury trial on the appellants' motion therefor or in denying their motion to have another judge called in on the filing of an affidavit of prejudice against the trial judge.

Like motions, based on the same statute (sec. 268.27 (3) and (4) Stats. 1931; sec. 103.60 (3) and (4) Stats. 1939) were made in **John F. Jelke Co. v. Beck**, 208 Wis. 650, 242 N. W. 576. It was there held, p. 660, that both motions were properly denied because the provision relied on only applied to proceedings involving "a labor dispute as that term is defined in the act." The "act involved was Ch. 376 Laws of 1931, which created secs. 268.18 to sec. 268.30 Stats. 1931, now secs. 103.51 to 103.63 Stats. 1939. Sec. 268.27 then provided as sec. 103.60 now provides that:

> "In all cases where a person shall be charged with civil or criminal contempt for violation of a restraining order or injunction issued by a court or judge or judges thereof, the accused shall enjoy: (1) . . . (2) . . . (3) . . . Right of jury trial (4) The right to file with the court a demand for the retirement of the judge sitting in the proceedings, upon an affidavit of prejudice being filed as is now provided by law in other cases."

We consider that neither pars. (3) nor (4) of sec. 103.60 Stats. is applicable to the instant proceeding. While by their terms these paragraphs cover cases of contempt arising out of a labor dispute and provide for change of venue and a jury trial therein it was held in the **Jelke Case**, supra,

that the section containing these paragraphs was not intended to have and does not have any application to the exercise by a court of equity in cases other than those growing out of a labor dispute as that term is defined in the act. This implies that the provision was intended to apply only to cases in equity brought to enjoin unlawful acts enjoinable under the rules of equity jurisprudence which make unlawful acts and irreparable injury essential to confer equity jurisdiction. Thus if in such an action, assuming, but not deciding, the constitutionality of par. (3) under the grant of equity powers of courts of equity by our state constitution, a court should issue an injunction or restraining order and a person should be charged with its violation the provision for a jury trial would apply. In the **Jeike Case**, supra, although the action was one in equity for an injunction, the right to a jury trial was held not to exist because the action had no relation to a labor dispute. Here, by parity of reasoning, par. (3) does not apply to the instant proceeding because the proceeding is not an action in equity for an injunction. It is not a proceeding cognizable by a court of equity to enjoin an unlawful act causing irreparable injury, but a statutory proceeding to review and enforce an order of an administrative Board. That right to a jury trial under sec. 103.60 (3) and (4) refers only to injunctions issued in equity cases, appears clearly from the previous sections relating to injunctions immediately previous to sec. 103.60, secs. 103.56 and 103.57, wherein the nature of the action contemplated is particularly shown. By par. (b) substantial and irreparable injury to property must exist; by (c) greater injury will result to plaintiff by denying relief than to defendant by granting it; and (e) plaintiff has no adequate remedy at law. None of these things need exist to authorize a cease and desist order in actions for enforcement of the Board's orders. We therefore hold that the

provision for a jury trial does not apply to the instant case, and that the right to trial before another judge does not exist because that provision, like that for a jury trial, exists only in a case invoking the equity jurisdiction of the court.

It is true that a trial court in New York has ruled (Boland v. Parisi, 18 N. Y. S. (2d) 698) that a provision of the New York Code of Civil procedure, similar to sec. 103.60, prescribing a jury trial in contempt proceedings for violation of an injunction issued in an equity case involving a labor dispute applies to violation of a cease and desist order issued in a proceeding before the New York Labor Board. Being a decision of a trial court it is at best of no higher status than the court whose decision we are reviewing. We do not accept it as governing our instant ruling.

It follows that the order of the circuit court must be affirmed.

By the Court.—The judgment and order of the circuit court are affirmed.

State of Wisconsin

In Supreme Court

January Term, 1941 No. 151

Carpenter Baking Co., a corporation,
Respondent,
v.
Bakery Sales Drivers Local Union No. 344 (A. F. of L.) et al.,
Appellants.

Appeal from a judgment of the circuit court for Milwaukee county, Wm. F. Shaughnessy, Circuit Court.

Affirmed.

Action by Carpenter Baking Company, a corporation, plaintiff, against Bakery Sales Drivers Local Union No. 344, Auto Truck Drivers Joint Council No. 50, Elmer Johnson, Joseph Reichartz, Gilbert Schlechta, and G. McMicken, defendants, commenced on August 15, 1940, to restrain defendants from conduct calculated to coerce and intimidate plaintiff's employees; from following plaintiff's employees and delivery trucks while the trucks were being used to deliver bakery products to customers; and from inciting and attempting to persuade persons not to deal with plaintiff or plaintiff's employees. The complaint alleged that plaintiff's employees are engaged in the sale and delivery of its products; have refused to designate defendant Bakery Sales Drivers Local Union No. 344 as bargaining representative; that no labor dispute exists between plaintiff and its employees; that defendants entered a conspiracy contrary to the provisions of sec. 343.681, Stats., to injure plaintiff's trade and business for the purpose of compelling plaintiff to coerce its employees to become members of defendant unions. The

complaint alleges that in furtherance of the conspiracy defendants in cars followed the delivery trucks of plaintiff and sought to dissuade plaintiff's customers from purchasing bakery products sold by plaintiff's employees on the ground that the employee was not a member of defendant unions. The answer alleged that plaintiff had engaged in conduct which was in violation of the National Labor Relations Act and had been found guilty of such conduct by an intermediate report of an examiner of the National Labor Relations Board after public hearing. The answer further set forth that the conduct of defendants was merely a peaceful and truthful advertisement of the fact that plaintiff's employees were not members of the defendant Bakery Sales Drivers Union. Defendants further set up that insofar as any of defendants' actions are violations of chapter 111 and sections 103.53 and 103.62 (3), Stats., these statutes are unconstitutional and void; that assuming that they are not, chapters 111 and 103, Stats., are inapplicable because plaintiff is engaged in interstate commerce and plaintiff does not come into court with clean hands and is entitled to no relief.

The case was tried to the court largely upon a stipulation of facts, and the court duly made and entered findings of fact and conclusions of law in which it held that conduct of defendants constituting a violation of sec. 111.06 (a) (b) (c) and (f). Judgment was entered on December 16, 1940, in accordance with the findings and conclusions, and defendants were restrained from adopting means and engaging in conduct intended and reasonably claimed to coerce and intimidate plaintiff's employees from following plaintiff's employees' delivery trucks while the trucks were being used to deliver products to plaintiff's customers; from inciting or attempting to persuade persons not to deal with plaintiff or plaintiff's employees, or with retail dealers offering plaintiff's products for sale; from

otherwise intentionally molesting, plaintiff or interfering with its business. Defendants appeal.

Per Curiam. Upon this appeal Mr. Justice Fowler, Mr. Justice Fairchild and Mr. Justice Martin are of the opinion that the judgment should be affirmed. Mr. Chief Justice Rosenberry, Mr. Justice Fritz, and Mr. Justice Wickhem are of the view that the judgment should be reversed. This situation necessarily results in affirmance of the judgment appealed from. Zohrlaut v. Mengelberg, 148 Wis. 592, 134 N. W. 1135.

Judgment affirmed.

FILE COPY

Supreme Court of the United States.

OCTOBER TERM, 1941.

No. 124.

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL NO. 122; PHIL L. VALLEY, JOHN ALEXANDER and JACK HEISDORF, Each Individually, as Business Agent, Organizer and Vice-President, Respectively, for, and as Representatives of, All the Members of Hotel & Restaurant Employees' International Alliance No. 122;

INTERNATIONAL LAUNDRY WORKERS, LOCAL NO. 174;

BARTENDERS INTERNATIONAL LEAGUE OF AMERICA, LOCAL NO. 64, Sometimes Known as International Bartenders and Beverage Dispensers, Local No. 64;

INTERNATIONAL UNION OPERATING ENGINEERS, LOCAL NO. 311;

MILWAUKEE BUILDING TRADES COUNCIL;

All Affiliated With the American Federation of Labor,
Petitioners and Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD; HENRY C. FULDNER, Individually and as Chairman of, L. E. GOODING, Individually and as a Member of, R. FLOYD GREEN, Individually and as a Member of, The Wisconsin Employment Relations Board;

PLANKINTON HOUSE COMPANY, a Corporation,
Respondents and Appellees.

PETITIONERS' BRIEF.

JOSEPH A. PADWAY
and
I. E. GOLDBERG,
Attorneys for Petitioners.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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Supreme Court of the United States.

OCTOBER TERM, 1941.

No. 124.

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL NO. 122; PHIL L. VALLEY, JOHN ALEXANDER and JACK HEISDORF, Eacn Individually, as Business Agent, Organizer and Vice President, Respectively, for, and as Representatives of, All the Members of Hotel & Restaurant Employees' International Alliance No. 122;

INTERNATIONAL LAUNDRY WORKERS, LOCAL NO. 174;

BARTENDERS INTERNATIONAL LEAGUE OF AMERICA, LOCAL NO. 64, Sometimes Known as International Bartenders and Beverage Dispensers, Local No. 64;

INTERNATIONAL UNION OPERATING ENGINEERS, LOCAL NO. 311;

MILWAUKEE BUILDING TRADES COUNCIL;

All Affiliated With the American Federation of Labor,
Petitioners and Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD; HENRY C. FULDNER, Individually and as Chairman of, L. E. GOODING, Individually and as a Member of, R. FLOYD GREEN, Individually and as a Member of, The Wisconsin Employment Relations Board;

PLANKINTON HOUSE COMPANY, a Corporation,
Respondents and Appellees.

PETITIONERS' BRIEF.

THE OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of Wisconsin is reported in 236 Wis. 329, 294 N. W. 632, and 295 N. W. 634 (decision on motion for rehearing).

The decision is set forth in the "Petition for Writ of Certiorari and Brief in Support Thereof" at pages 38 through 59. It is, therefore, not set forth in this brief.

JURISDICTION.

Jurisdiction of this Court is invoked under the provisions of the Act of Congress of February 13, 1935, Section 347B, 28 U. S. C. A., Section 344-B, giving jurisdiction to this court

> "to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by appeal any cause wherein a final judgment or decree has been rendered and passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any state on the ground of being repugnant to the Constitution or laws of the United States; or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution. * * *"

This case is one in which the validity of the Statutes of the State of Wisconsin, to wit, Section 111.01 through 111.19, Wisconsin Statutes 1939, particularly Section 111.06 (2) (e) thereof, and an order and enforcing judgment based thereon, is drawn in question upon the ground that such statutes, order and judgment, on their face and as construed in the opinion and judgment of the Supreme Court of the State of Wisconsin, are repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, as depriving the petitioners of liberty or property without due process of law, denying to the petitioners the equal protection of the laws, and, more particularly, denying to the petitioners the constitutionally-secured right of freedom of speech. The decision of the Wisconsin Supreme Court was in favor of the validity of the statute, order and judgment.

The petitioning unions alleged and argued before the

Wisconsin Employment Relations Board (R. 77-80), before the Circuit Court for Milwaukee County (R. 2-6), and before the Supreme Court of the State of Wisconsin (see decision, Supp. R. 53), that Section 111.06 (2) (e) of the Wisconsin Statutes and the order of the Board were unconstitutional, void, and of no effect whatsoever because they were repugnant to the Fourteenth Amendment to the Constitution of the United States, as depriving petitioners (1) of freedom of speech and assembly, (2) of the equal protection of the laws, and (3) of liberty and property, without due process of law.[1]

The federal question of whether the Wisconsin Statutes in question and the order of the Board based on such statutes violated the Constitution of the United States thus was raised before every tribunal in which the proceeding was tried, heard and argued.

The Supreme Court of Wisconsin specifically held that neither the statute nor the order nor the enforcing judgment deprived petitioners of any rights guaranteed under the Fourteenth Amendment to the Constitution of the United States, the Court stating:

"We discover no invasion of the right of free

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[1] Under the Wisconsin Supreme Court practice errors are assigned in the brief. In the brief of petitioners herein, appellants before the Wisconsin Supreme Court, under the title "Errors Assigned" (pages 24, 25), it is specifically set forth as follows:

"(1) The Circuit Court for Milwaukee County erred in affirming that order of the Wisconsin Employment Relations Board requiring the appellant unions, their officers, members, agents, successors and assigns, to cease and desist from engaging in, promoting or inducing picketing at or near the Plankinton House or Kilbourn Hotel and from boycotting in any way the Plankinton House for the reason that:

"(a) Section 111.06 (2) (e), upon which such order is based, is unconstitutional, void and of no effect whatsoever, being contrary to the Fourteenth Amendment to the Constitution of the United States and Article I of the Constitution of the State of Wisconsin.

"(b) Such order deprives the unions, their officers, members and agents from exercising the constitutional rights of freedom of speech, press and assemblage, guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I of the Constitution of the State of Wisconsin."

speech either in sub. (2) (e) 111.06, Stats. 1939, or in the way the law was administered by the Board in this case" (Supp. R. 64).

While the principal decision of the Wisconsin Supreme Court, together with the decision on petition for rehearing, are in some respects somewhat difficult to fathom, the following is clear:

1. The federal question of whether a requirement that the majority of employees in a bargaining unit must authorize a strike before peaceful picketing and boycotting pursuant thereto can be permitted[2] violates the Fourteenth Amendment, either because it deprives of the right to free speech or because it denies the equal protection of the laws, was passed upon in favor of its validity in the principal decision (Supp. R. 59); and

2. In both decisions the federal question of whether the order and the enforcing judgment prohibiting all picketing and all boycotting, either as predicated upon the statute or as predicated on the facts and circumstances of the case, violated the Fourteenth Amendment, was determined in favor of its validity (Supp. R. 64 and 69).

STATEMENT OF THE CASE.

(Reference to the Supplementary Record—Supp. R.—refers to the record printed by the clerk of this court as distinguished from the printed record used in the court below.)

The Plankinton House Company is a Wisconsin corpora-

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[2] Section 111.06 (2) (e), Wisconsin Statutes 1939, provides:

"(2) It shall be an unfair labor practice for an employee individually or in concert with others: * * * (e) to co-operate in engaging in, promoting, or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike."

tion, engaged in the general hotel business, and operating the Plankinton House and the Kilbourn Hotel in the City of Milwaukee, Wisconsin (R. 251).

The Plankinton House Company employed approximately 160 employees eligible to membership in the petitioning unions (Exhibit 42), all of which employees were required to become and remain members of such unions pursuant to an all-union agreement entered into between the company and such unions. The unions and the hotel company entered into such written agreement on or about June 16, 1938, covering the terms and conditions of employment of the employees of the company, and recognizing the unions as the exclusive bargaining agents for such employees (R. 252).

On May 15, 1939, pursuant to a specific clause in such agreement, permitting the continuation thereof after revision, the unions gave notice to the company that they desired to continue the contract, but also desired to negotiate changes therein to become effective for the coming year. The company likewise served notice of proposed changes (R. 253-254).

Upon the inability of the parties to agree upon such proposed changes the matter was submitted to an arbitration board, as provided for by the agreement. The arbitration award was unsatisfactory to the unions. **The contract provided that if either party was dissatisfied with the award the right to strike or lockout was available** (R. 253, Exhibit 1). Therefore, pursuant to the contract, a strike was called of the employees, **most** of the employees of the hotels responding to the strike call (R. 253-256).

No secret vote was held amongst the employees prior to the strike (R. 256), contrary to the provisions of the "Peace Act," Section 111.06 (2) (e) thereof, providing:

"(2) It shall be an unfair labor practice for an em-

ployee individually or in concert with others: * * *
(c) To co-operate in engaging in, promoting or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike."

The unions engaged in picketing the entrances to the Plankinton House and the Kilbourn Hotel, and carried banners advising the public of the strike. During the early days of the strike there were some instances of disorder on the picket line consisting in all of six simple assaults and two instances of delivery stoppage, all occurring on four days in the period between November 4 and November 17, 1939 (R. 257-259)."

The Plankinton Hotel Company complained to the Wisconsin Employment Relations Board, charging the petitioning unions, their officers, agents, and members, with having committed unfair labor practices by engaging in the concomitants of a strike although a majority of the employees had not first voted by secret ballot to call such strike, and praying that their picketing activities be restrained and enjoined (R. 58).

Petitioners answered and in their answer challenged the constitutionality of the legislation under which the jurisdiction of the Board was invoked (R. 70).

After a hearing and the taking of evidence, the Wisconsin Employment Relations Board, on February 15, 1940, made its findings of fact and conclusions of law and entered an order restraining the unions, their officers, agents, successors, and assigns, from

"(a) Engaging in, promoting, or inducing picketing at or near the Plankinton House, or the Kilbourn Hotel;

"(b) Attempting to hinder or prevent by threats,

intimidation, force or coercion of any kind the pursuit of lawful work by employees of the Plankinton House Company;

"(c) Boycotting in any way the Plankinton House Company" (R. 251-262).

The reasons for this order were stated by the Board, both in its Conclusions of Law and Decision, to be as follows: The respondent unions were **"guilty of unfair labor practices by co-operating and engaging in promoting and inducing picketing and boycotting, all being overt concomitants of a strike, without first obtaining the approval of the majority of the employees of the Plankinton House Company by a secret ballot."** The employees who went out on strike and who remained out on strike were found to have been "parties to an unfair labor practice by co-operating and engaging in a strike without first obtaining the approval of a majority of such employees." (Conclusions of Law Nos. 2 and 3, R. 259-260, R. 267-268.)

Pursuant to the method for appeal provided in the statute [Sec. 111.07 (8)], the petitioning unions sought review and the setting aside of such order in the Circuit Court of Milwaukee County, Wisconsin, by petition which alleged in part that the order of the Board and the act on which the order was based were unconstitutional and void as being repugnant to the Fourteenth Amendment to the United States Constitution (R. 2-6). The Board cross petitioned for enforcement (R. 6). The Plankinton House Company, upon petition, was permitted to intervene as a party (R. 11). The Circuit Court affirmed, sustained and enforced the Board's order in its entirety by decision (R. 12-47), and by appropriate decree (R. 47-51), violation of which would be punishable by contempt.

The petitioning union then appealed to the Supreme Court of the State of Wisconsin, again raising on appeal the constitutional questions as aforesaid (R. 53). The

Supreme Court affirmed the judgment of the Circuit Court for Milwaukee County on November 8, 1940, and upheld the Board's order prohibiting all picketing and boycotting (R. 64).

Motion for rehearing was made and was denied by the Wisconsin Supreme Court on January 7, 1940, in a supplemental decision (R. 65 and 69).

In its principal decision the Court found that the "Act" did not violate any constitutional prohibitions, specifically finding that the majority-minority classification was a valid one, attempting to distinguish the decisions of this Court in the **Thornhill** and **Carlson** cases on the grounds, among other things, that the law regulates concert of action rather than bans individual rights.

SPECIFICATION OF ERRORS.

The Supreme Court of the State of Wisconsin erred in the following respects:

1. In holding that Section 111.06 (2) (e), Statutes 1939, was not violative of the Fourteenth Amendment to the Constitution of the United States.

2. In sustaining those portions of the judgment of the Circuit Court for Milwaukee County, Wisconsin, enforcing the order of the Wisconsin Employment Relations Board which provided that your petitioners

> "(1) Immediately cease and desist from
>
> "(a) Engaging in, promoting, or inducing picketing at or near the Plankinton House, or the Kilbourn Hotel;
>
> "(b) Attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employees of the Plankinton House Company;
>
> "(c) Boycotting in any way the Plankinton House Company."

3. In sustaining the order so as to prohibit peaceful activities unattended by violence, disorder, or breach of the peace, which activities were intended to make known the facts of the controversy between employees and employers, and between one group of employees on the one hand and another group of employees on the other hand.

With respect to the second error above specified it is the position of petitioners that such order and judgment, whether based upon statute or upon any purported holding that the right to picket or boycott has been forfeited be-

cause of the facts and circumstances established by the record respecting alleged violence, consisting of a few isolated instances of simple assault, deprives the petitioners of the privileges or immunities of citizens of the United States; deprives your petitioners of life, liberty and property without due process of law; and denies to your petitioners equal protection of the law, all in violation of the Fourteenth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT.

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I. Legislative history of Wisconsin labor laws and summary analysis of Chapter 57, Laws of 1939 18-22

Although the State of Wisconsin in 1919 enacted into law Section 20 of the Clayton Act, and in 1931 anticipated the Norris-LaGuardia Act by one year, by enacting the Labor Code identical with the Norris-LaGuardia Act, and in 1937 enacted a Little Wagner Act, patterned directly after the National Labor Relations Act, the reactionary legislature of 1939 sought to wipe all those statutes off the books by enacting Chapter 111, which is now before this Court for its consideration. Examination of Chapter 111 will disclose that it represents an effort on the part of the Wisconsin Legislature to circumvent the opinions of this Court in the cases of **Lauf v. Shinners**, 303 U. S. 323; **New Negro Alliance v. Sanitary Grocery Company, Inc.**, 303 U. S. 552, and **Senn v. Tile Layers' Union**, 222 Wis. 383, affirmed 301 U. S. 468, and, further, that it sought to enact into law the repudiated doctrines of the cases of **Duplex Co. v. Deering**, 254 U. S. 433, and **Bedford Cut Stone Company v. Journeymen Stone Cutters' Association**, 274 U. S. 37.

Chapter 111, Wisconsin Statutes 1939, is not in any sense of the term an "Employment Peace Act," but is an act which seeks to impose involuntary servitude upon the workers of the state. It deprives such workers of the rights which are assured to them by the Fourteenth Amendment to the Constitution of the United States, and is a bald perversion of the National Labor Relations Act.

II. Section 111.06 (2) (c), Wisconsin Statutes 1939 (Chapter 57), is unconstitutional, void and of no effect whatsoever, because it contravenes the guaranties of

free speech and equal protection of the laws afforded by the Fourteenth Amendment to the Constitution of the United States 23-38

It clearly appears from the record in these proceedings that the order of the Board is predicated upon the provisions of Section 111.06 (2) (e) of the statutes, which provides as follows:

> "(2) It shall be an unfair labor practice for an employee individually or in concert with others: * * * (e) To co-operate in engaging in, promoting, or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike."

In the instant case there is no question as to the legality or the purposes of the strike, but the sole question is whether or not Chapter 111, Wisconsin Statutes 1939, or any order or judgment purportedly based thereon deprive individuals or minority groups of the rights assured to them by the Fourteenth Amendment to the Constitution of the United States.

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Decision of this Court in the cases of **Thornhill v. Alabama**, 310 U. S. 88, **Carlson v. Cali-**

fornia, 310 U. S. 106, and **American Federation of Labor v. Swing**, 61 Sup. Ct. 568, are conclusive on the point that picketing and boycotting constitute the workingman's means of communication, and are synonymous with the term "free speech," one of the rights assured to the petitioners under the Fourteenth Amendment to the Constitution of the United States.

2) Section 111.06 (2) (e) is to be tested on its face 27-29

In the case of **Thornhill v. Alabama** it was expressly held by this Court that where rights such as freedom of speech are concerned it is the statute itself which must be construed on its face rather than the accusation or the evidence under it so as to eliminate the existence of threat of censorship or prohibition of such rights.

In the instant case the Wisconsin Supreme Court ignored the caveat of the **Thornhill** case, and did not test the statute on its face.

3) Section 111.06 (2) (e) is not valid as a proper exercise of the police power of the state 29-30

The segregation of employees into minority or majority groups for the purpose of ascertaining whether or not such groups may exercise rights guaranteed under the Constitution bears no reasonable relationship to the exercise of the police power of the state, since there is no inherent danger to public property, health, safety, or morals when peaceful picketing is carried on by a minority group of employes rather than by a majority group.

4) The right to disseminate information is not limited to employer-employee relationship 30-33

Under the decision of this Court in the case of **American Federation of Labor v. Swing**

neither the state, its administrative bodies, or its courts may constitutionally limit the area of industrial dispute to the direct employer-employee relationship or to an employer-majority of employees relationship. If the law were otherwise minority groups would be prohibited from expressing their just complaints.

B. Section 111.06 (2) (e) denies equal protection of the laws 34-38

The classification into majority and minority groups of employees for the purpose of ascertaining whether or not such employees may engage in picketing, boycotting, or any other overt concomitant of a strike bears no reasonable relationship to public health, safety or morals.

Reliance upon the majority rule, as in the case of elections, is a complete disregard of the fundamental democratic proposition that those dissatisfied with the action of the majority remain free to express their opinions and criticisms, and do not forfeit their constitutional rights because they are in a minority.

Legislation of the type of Chapter 111, seeking to deprive minority groups of constitutional rights, constitutes an opening wedge to the exploitation of such minority groups, similar to that which we now find in the tragic history of European countries.

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The order entered by the Wisconsin Employment Relations Board and enforced by the judgment of the Circuit Court for Milwaukee County and the Wisconsin Supreme Court was not based

upon any finding that the unions had engaged in such extreme and flagrant violence that the trier of fact could justifiably conclude "that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful." This is demonstrated not only by the findings of fact and conclusions of law entered by the state board, but by the action of the Circuit Court for Milwaukee County in permitting, pending the appeal to the Wisconsin Supreme Court, peaceful activities during certain hours of the day. Certainly, if the order were based upon extreme and flagrant violence so enmeshed with and indistinguishable from the peaceful activities that one could not be separated from the other, the Court would not have permitted continued peaceful activities.

The first decision of the Wisconsin Supreme Coure dealt only with the statute and was not based upon any purported application of the **Meadowmoor** case, which had not yet been decided when the Court's decision was rendered.

Under the decision of this Court in the **Meadowmoor** case the only justification for the entry of an order prohibiting all picketing and boycotting must lie in the express finding of acts of extreme violence, so enmeshed with and indistinguishable from peaceful and legitimate activities that the trier of fact can come to the reasonable conclusion that such complete ban is necessary to prevent similar acts of extreme violence in the future, and until the time that the momentum of fear generated by such violence has appreciably declined or disappeared. In the instant case there has been no such finding, nor could there be on the record.

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Reference to the record upon which the findings of fact of the Board are based shows no instances.

of "continuing and recurring flagrant violence" as was present in the **Meadowmoor** case.

The police officer testified that the police department "has been able to maintain order very, very adequately," and that it had "the situation very well in hand" (R. 197, 198).

We have in this case only isolated disorders and fugitive encounters occurring during the early days of the strike, and which did not recur subsequently. By no stretch of the imagination can the record be found to sustain an order prohibiting all picketing and boycotting.

C. There is no finding that the unlawful activities were authorized by or attributable to the union.....50-51

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The order in the instant case bans picketing and all **boycotting**, contrary to the caveat of the **Meadowmoor** case. An injunction issued because of extreme and flagrant violence must be limited to those activities which are related to such violence, and may not include unrelated activities. The decision of the Wisconsin Supreme Court demonstrates that the order is so broad in the instant case as to include all peaceful activities regardless of whether or not such activities are related to the mild disorders which occurred.

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The decision of the Wisconsin court is based upon an attempt to distinguish the **Thornhill** and **Carlson** cases on the following grounds:

1. In those cases the legislation dealt with the action of individuals. In the instant case it deals with "collective" or "concerted" activities....57-60

2. In those cases the Court had before it absolute prohibitions of the right of free speech. In the instant case such absolute prohibition to a minority is called regulation....61-63

3. In those cases the exercise of rights guaranteed by the Constitution were by legislative declaration termed "unlawful" acts, while in the instant case we are dealing with "unfair labor practices"....63-66

4. The term "picketing," as used in the **Thornhill** case, differs in meaning and scope from that term as it is used in section 111.06 (2) (c)....66-68

5. In the instant case the Legislature has not prohibited the right to strike, but has divided strikes into authorized and unauthorized activities, permitting the exercise of constitutional rights in the one case and prohibiting it in the other....68-78

There is obviously no basis for any such purported distinctions.

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ARGUMENT.

I.

LEGISLATIVE HISTORY OF WISCONSIN LABOR LAWS AND SUMMARY ANALYSIS OF CHAPTER 57, LAWS OF 1939.

In 1919 the State of Wisconsin—consistent with the tradition of that state as the cradle of liberal and progressive legislation—enacted chapter 133.07 of the statutes entitled, "Working men may organize; injunction not to restrain certain acts." This statute was the counterpart of the Federal Clayton Act, containing the famous section 20 of the act. When it subsequently became apparent that the Clayton Act did not provided the working men the protection it was designed to afford (**Duplex Co. v. Deering**, 254 U. S. 433) the Wisconsin Legislature in 1931 enacted the State Labor Code, the counterpart of the Norris-La Guardia Act, Section 103.53 through 103.63, Wisconsin Statutes. This statute was one of the first of its kind in this country, and preceded by one year the enactment of the Norris-La Guardia Act by the Congress of the United States, which sought to prevent "goverment by injunction," which neither the Sherman Anti-Trust Act nor the Clayton Act was successful in doing.

In 1937 the Wisconsin Legislature adopted what is commonly known as the "Little Wagner Act," which, with minor variations, was the counterpart of the National Labor Relations Act (Ch. 111, Wis. Stats. 1937).

Under these three different enactments the Wisconsin Legislature took the lead in securing for its residents the right to organize, to bargain collectively through their chosen representatives, and to engage in those activities which give life and vitality to those rights embraced within the statutory term "mutual aid and protection,"

and if to secure those rights the employees were obliged to strike or disseminate information by the use of the picket line, or to cease patronizing and urging others to cease patronizing the concern with which the dispute is had, such activities were likewise protected.

Trustees of Wisconsin State Federation of Labor v. Simplex Shoe Co., 212 Wis. 623, 256 N. W. 56;
American Furniture Co. v. I. B. of T. C. S. & H. of A., 222 Wis. 338, 268 N. W. 250;
Senn v. Tile Layers' Union, 222 Wis. 383, 268 N. W. 270, affirmed 301 U. S. 468, 81 L. Ed. 1229.

In 1939, however, a reactionary Legislature and a reactionary administration sought to nullify all of these rights by repealing Chapter 111 of the Statutes of 1937 and replacing it with what was called "The Employment Peace Act," some of the sections of which are involved in the instant proceedings. The act itself is set forth in the "Petition for Writ of Certiorari and Brief in Support Thereof" at pages 59 through 77.

This same Legislature amended the Wisconsin Labor Code (protoype of the Norris-La Guardia Act) by redefining a labor dispute as

> "any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives" [Section 103.62 (3)],

and by declaring that

> "it shall be unlawful for anyone to picket, or induce others to picket, the establishment, employees, supply or delivery vehicles, or customers of anyone engaged in business, or to interfere with his business, or interfere with any person or persons desiring to transact or transacting business with him, when no labor dispute as defined in subsection (3 of Section 103.62 ex-

ists between such employer and his employees or their representatives" (Section 103.535).

Examination of the provisions of chapter 111 demonstrates that it repeals and supersedes all laws which may be in conflict therewith (Section 111.17), and that it seeks to prevent, by a majority-minority device, the exercise of certain rights which are secured by the Fourteenth Amendment to the Constitution of the United States, as interpreted by the recent decisions of this Court [Section 111.06 (2) (c)].

A labor dispute is defined under the law as being:

"any controversy between an employer and the **majority** of his employes in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives" [Section 111.02 (8)].

A secondary boycott is defined as

"combining or conspiring to cause or threaten to cause injury to one with whom no labor dispute exists; whether by (a) withholding patronage, labor, or other beneficial business intercourse, (b) picketing, (c) refusing to handle, install, use, or work on particular materials, equipment, or supplies, or (d) by any other unlawful means, in order to bring him against his will into a concerted plan to coerce or inflict damage upon another" [Section 111.02 (12)].

The act then goes on to define what are unfair labor practices on the part of employees, either individually or in concert with others.

Section 111.06 (2) (a) bars picketing of homes of employees. Section 111.06 (2) (c) bars picketing, boycotting, or any other over concomitants of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed

have voted by secret ballot to call a strike. Section 111.06 (2) (g) prohibits secondary boycotts as above defined, and the hindering or preventing by any means whatsoever the obtaining, use, or disposition of materials, equipment, or services, except in sympathetic strikes in support of those in similar occupations working for other employers in the same craft.[3]

Examination of the provisions of the law demonstrates that it is designed principally to hamper, impede and prevent employees from engaging in the right of self-organization, by declaring it to be an unfair labor practice to engage in those activities, without which in many cases organization cannot be effected.

The enactment of chapter 111 constitutes a deliberate attempt on the part of the Wisconsin Legislature to circumvent the holdings of this Court in the cases of **Senn v. Tile Layers' Protective Union**, 301 U. S. 468; **Lauf v. Shinners**, 303 U. S. 323, and **New Negro Alliance v. Sanitary Grocery Company, Inc.**, 303 U. S. 552. The enactment of this law also represents the effort on the part of the Wisconsin Legislature to adopt the thoroughly discredited doctrine of the case of **Bedford Cut Stone Company v. Journeymen Stone Cutters' Association**, 274 U. S. 37, as well as that of the case of **Duplex Company v. Deering**, 254 U. S. 443. The vicious doctrine of both of those cases

[3] Sections 111.06 (2) (a) and 111.06 (2) (g) read as follows:

"(2) It shall be an unfair labor practice for an employee individually or in concert with others:

"(a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family.

"(g) To engage in a secondary boycott; or to hinder or prevent, by threats, intimidation, force, coercion or sabotage, the obtaining, use of disposition of materials, equipment or services, or to combine or conspire to hinder or prevent, by any means whatsoever, the obtaining, use or disposition of materials, equipment or services, provided, however, that nothing herein shall prevent sympathetic strikes in support of those in similar occupations working for other employers in the same craft."

was recently put to rest by the decisions of this Court in the cases of **United States v. Hutcheson**, 61 Sup. Ct. 463, and **Apex Hosiery Company v. Leader**, 310 U. S. 468.

While the Wisconsin act, therefore, is presumably an "employment peace act," it could be better defined as an an "employee slavery act," since, while paying lip service to the right to organize and bargain collectively, the act really embodies within it complete prohibitions upon the right of individuals, either singly or in concert, to exercise the rights assured to them by the Fourteenth Amendment to the Constitution of the United States, to the end that there may be no liberty of organization nor right to strike effectively.

The so-called "Wisconsin Employment Peace Act" repudiates and perverts the basic principles of the National Labor Relations Act and the 1937 Wisconsin Labor Relations Act patterned after it. While the foundation upon which the National Labor Relations Act rests is equalization of bargaining power of employers and employees, the Wisconsin Act destroys this principle of equalization and reinvests in employers powers far in excess of those possessed of employers before the passage of any labor relations act in this country, and prohibits by unconstitutional methods those activities which may bring the economic strength of the worker on a more nearly equal level with the economic strength of the employer.

The entire scheme of chapter 111 must be taken into consideration to understand what the State of Wisconsin, through its Legislature and administrative body and through its courts, have sought to impose upon the workers of this state—an involuntary servitude, and a prohibition of rights secured by the Fourteenth Amendment to the Constitution of the United States.

II.

SECTION 111.06 (2) (e), WISCONSIN STATUTES 1939, IS UNCONSTITUTIONAL AND VOID AND OF NO EFFECT WHATSOEVER BECAUSE IT CONTRAVENES THE GUARANTIES OF FREE SPEECH AND EQUAL PROTECTION OF THE LAWS AFFORDED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The first question presented for consideration is whether section 111.06 (2) (e), prohibiting peaceful picketing in connection with a strike, where such strike was not authorized by a majority of employees in a particular unit, contravenes the Fourteenth Amendment.

That the constitutionality of section 111.06 (2) (e) is involved in this case is conclusively indicated by the following facts:

1. The State Labor Relations Board predicated its order prohibiting all picketing and boycotting specifically and solely on the fact that petitioners had not complied with section 111.06 (2) (e) in securing the majority strike vote called for therein. See its Conclusions of Law 2 and 3 (R. 259-260) and its Memorandum Decision (R. 267).[4] The element of violence was not relied upon by such Board to support its order. Certain named individuals were found to have committed unfair labor practices by virtue of the misdemeanors committed by them (R. 260); but the only

[4] Conclusions of law 2 and 3 made by the Board are as follows:

2. That the respondent unions are guilty of unfair labor practices by co-operating and engaging in promoting and inducing picketing and boycotting, all being overt concomitants of a strike, without first obtaining the approval of the majority of the employes of the Plankinton House Company by a secret ballot.

3. That all of the former employes of the Plankinton House Company who went out on strike and who remained out on strike, have been parties to an unfair labor practice by co-operating and engaging in a strike without first obtaining the approval of a majority of such employes.

unfair labor practice found to have been engaged in by the respondent unions, petitioners herein, was the failure to secure the majority vote. **The State Labor Board did not find that any of the disorders were authorized or ratified by the union, nor could it so find on the basis of the uncontroverted record.**

2. The decision of the Circuit Court of Milwaukee County, sustaining the order in its entirety, was again based upon the failure of petitioners to comply with section 111.06 (2) (e), and that Court upheld section 111.06 (2) (e) as a valid exercise of the state police power. Here again the element of violence was not relied upon to sustain the order. See Circuit Court decision (R. 12).

3. Most important is the fact that the principal opinion of the Supreme Court of Wisconsin deals at length with the validity of section 111.06 (2) (e), and that opinion specifically affirms the validity of that section as a proper exercise of the police power. (See discussion of opinion at pages 56-78 of this brief.) This opinion has never been withdrawn.

The issue of the constitutionality of section 111.06 (2) (e) was necessarily passed upon by the Wisconsin Supreme Court. It was on that section of the statute that the order against the unions was predicated. But for that section the restraint against all picketing and all boycotting, finally upheld by the Supreme Court, would never have been issued in the first place. Any attempt by the Supreme Court in its supplementary opinion after motion for rehearing to circumvent its previous decision upholding the constitutionality of section 111.06 (2) (e) without withdrawing the same, must be considered as "so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent review of the decision on the Federal question." See **Leathe v. Thomas**, 207 U. S. 93, 99; **Ohio State Bank v. Bryan**, 282 U. S. 765, 774; **Johnson v. Risk**, 137 U. S. 300, 307.

In the present case no question exists as to the legality of the purposes of the strike or the justification for the picketing. We have merely this simple and ordinary factual situation:

A group of unions have a contract with an employer. Upon the expiration of the contract year the unions seek improved terms. The unions strike, and commence picketing and boycotting in support of such strike. The picketing and boycotting are enjoined under the provisions of Chapter 111, Wisconsin Statutes 1939, because such unions have failed to obtain a vote of the employees in which a majority of such employees authorize the strike, as required by section 111.06 (2) (e).

The simple issue is: Does Chapter 111, Wisconsin Statutes 1939, and particularly section 111.06 (2) (e) thereof, deprive the unions and their members of freedom of speech? And, further, does section 111.06 (2) (e) deprive minority groups of the equal protection of the laws? The further issue raised by the memorandum opinion of the Wisconsin Court is, if the plain terms of the statute are to be disregarded and the statute is not to be tested on its face, does the record sustain the issuance of the complete and comprehensive injunction against all picketing and boycotting under any purported application of the **Meadowmoor** case?

A. Section 111.06 (2) (e) Unlawfully Deprives Petitioners of the Right to Freedom of Speech Guaranteed by the Fourteenth Amendment to the Constitution of the United States

If the right peacefully to picket and boycott to inform the public of the facts of a labor dispute, and to marshal public opinion on the part of the work, is, as many times determined by this Honorable Court, a concomitant of the right of free speech, surely this constitutional right is not

one the exercise of which can be made dependent upon the wishes of a majority in a particular bargaining unit. Surely, it cannot be said that such a clear danger of substantive evils arises in cases of minority strikes or minority picketing or minority boycott as to justify an exercise of the state's police power in this respect (**American Federation of Labor v. Swing**, 85 L. Ed. [Adv. Op.] 513).

1. **"Picketing, boycotting or any other overt concomitant of a strike" when peacefully carried on are synonymous with "free speech," which is included within the terms of the Fourteenth Amendment to the Constitution of the United States.**

The decisions of this Court in the cases of **Thornhill v. Alabama**, 310 U. S. 88, and **Carlson v. California**, 310 U. S. 106, as well as its most recent pronouncements in the cases of **Milk Wagon Drivers Union et al. v. Meadowmoor Dairies, Inc.**, 85 L. Ed. (Adv. Op.) 497, and **American Federation of Labor v. Swing**, supra, have identified picketing and boycotting as the "working man's means of communication," and as synonymous with the term "free speech," which is within the protection of the Fourteenth Amendment to the Constitution of the United States from abridgement by the states.

In the **Thornhill** case this Court very significantly stated:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."

In the **Carlson** case this Court stated:

> "For the reasons set forth in our opinion in Thornhill v. Alabama, supra, publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth, or banner, must now be regarded as within that liberty of communication which is secured to every person by the

Fourteenth Amendment against abridgment by the State."

American Federation of Labor v. Swing, 85 L. Ed. (Adv. Op.) 513;
Senn v. Tile Layers' Protective Union, 301 U. S. 468;
C. I. O. v. Hague, 307 U. S. 197;
Schneider v. State, 308 U. S. 147;
Lovell v. Griffin, 303 U. S. 444.

2. **Section 111.06 (2) (e) is to be tested on its face.**

It was held in the case of **Thornhill v. Alabama**, supra, that statutes, the validity of which is challenged as depriving persons of rights secured by the Fourteenth Amendment to the Constitution of the United States, must be tested on their face. The Court pointed out that

> "proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. * * * It is not the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. * * * **Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression.** * * *" (Emphasis ours.)

Yet in the instant case the Supreme Court of the State of Wisconsin did not test Section 111.06 (2) (e) on its face, nor did it test the order entered thereon on its face, but wrote a tortured opinion seeking to justify the distinctions between majority and minority action on the basis of claimed distinctions between what was prohibition in the Alabama statute (**Thornhill** case) and what was only claimed regulation under the Wisconsin statute.

The Wisconsin Supreme Court stated in its opinion, with reference to the **Thornhill** case:

> "As construed by the state court it (The Alabama statute) prohibited the publishing of the facts of a labor dispute either by printed sign, by pamphlet, by word of mouth or otherwise. The Peace Act deals with concerted action in carrying on an unauthorized strike by the usual overt acts concomitant of a strike" (Supp. R. 55).

The Court also sought to justify its refusal to follow the **Thornhill** case by stating that Section 111.06 (2) (c) does not invade the right of freedom of speech because "the right of the **individual** to freedom of speech is by the terms of the act left unimpaired. It is the right to **concert of action** that is regulated." (Emphasis ours.) (Supp. R. 64.)

The Wisconsin Court further stated that Section 111.06 (2) (c) does not forbid picketing, but rather "attempts to regulate it and to provide under what conditions and circumstances picketing may be carried on by striking employees" (Supp. R. 55).

(Extended discussion of these holdings will be found in this brief at pages 56-78.)

It is apparent from the few excerpts above quoted that the Court did not seek to test this statute on its face at all, but sought to distinguish it from the statute before this Court in the **Thornhill** case by drawing superficial and insubstantial distinctions.

The emphasized portion of the quotation from the **Thornhill** case, supra, is particularly pertinent in the instant case in view of the undue emphasis placed by the Wisconsin Court in its opinion on the motion for rehearing on isolated acts of mild disorder which the record disclosed. The Court ignored completely the fact that the

Wisconsin Employment Relations Board did not base its order on those few isolated acts. And although the Wisconsin Supreme Court in its opinion states specifically that it was concerned only with Section 111.06 (2) (e) of the Wisconsin Statutes, it, nevertheless, did not test such statute on its face, but apparently sought to ground its opinion on other provisions of the law such as Section 111.06 (2) (f) which makes it an unfair labor practice to engage in threats, intimidation, force, or coercion. Yet Section 111.06 (2) (f) was not in the case, did not afford the basis for the order of the Board, and the Wisconsin Supreme Court expressly stated that it was Section 111.06 (2) (e) with which it was concerned and no other section.

3. Section 111.06 (2) (e) is not valid as a proper exercise of the police power of the state.

Deprivation of the liberty of discussion in labor disputes can be permitted only when such deprivation is necessary to prevent a clear and present danger of the destruction of life and property or the invasion of the right of privacy. Freedom of speech can be abridged only when clearly necessary for the protection of some real and apparent danger to public safety, health or morals. As stated by this Court in the **Thornhill** case, supra:

> "Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. * * * But no clear and present danger of destruction of life or property or invasion of the right of privacy or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter."

Indeed, as stated by Justice Reed in his dissent in **Milk**

Wagon Drivers' Union v. Meadowmoor Dairies, Inc., supra:

> "This nation relies upon public discussion as one of the indispensable means to attain correct solutions of problems of social welfare. Curtailment of free speech limits this open discussion. Our whole history teaches that adjustment of social relations through reason is possible while free speech is maintained. **This Court has the solemn duty of determining when acts of legislation or decrees of courts infringe that right guaranteed to all citizens. Free speech may be absolutely prohibited only under the most pressing national emergencies. Those emergencies must be the kind that justify the suspension of the writ of habeas corpus or the suppression of the right of trial by Jury.**" (Emphasis ours.)

Clearly, no inherent danger to public property, health, safety or morals is present when peaceful picketing is carried on by a minority of employees rather than by a majority. No reason appears, nor has been offered, why peaceful picketing by minority groups is any more inherently dangerous to the public safety than peaceful picketing carried on by majority groups. The only possible reason which could be asserted in support of section 111.06 (2) (e) as a proper exercise of the police power is that picketing by minority rather than majority groups must necessarily and in all instances result in danger to public health, safety or morals. Such a contention has not been made and would, of course, be preposterous.

4. The right to disseminate information not limited to employer-employee relationship.

The right of labor to disseminate information concerning controversies with employers is not limited to certain types of controversies as, for example, those specifically

and directly involving only "wages, hours or working conditions," nor is it limited to controversies where immediate employees of the employer affected are disputing, or to where a particular class of employees are involved.

This question was definitely laid to rest by the decision of this Court in the case of **American Federation of Labor v. Swing**, supra. In that case an injunction of an Illinois court, restraining picketing and boycotting because there was no direct dispute between the working employees and their employer, was held to be an unconstitutional restraint of the right of free speech. This Court stated:

> "**The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute whether those limits be defined by statute or by the judicial organ of the state.** A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. American Foundries v. Tri-City Council, 257 U. S. 184, 209. The right of free communication cannot, therefore, be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. **Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's case.** 'Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.' Senn v. Tile Layers' Union, 301 U. S. 468, 478." (Emphasis ours.)

Under this decision the state cannot make the right to picket dependent upon whether or not majority or minority groups of employees have approved in a secret written ballot.

The state cannot make the right to picket, whether by legislative fiat, by action of administrative boards, or by the judicial arm of the state, dependent upon the granting of a **license** to a minority by a majority of the employees of the particular employer involved.

The constitutional right of Wisconsin workmen to **peacefully** disseminate information concerning an employer's labor practices by any of the methods falling within the "vague contours of the term 'picket' " (**Thornhill** case) cannot be abridged by the state merely because the exercise of such right had not been previously licensed by a majority in a secret ballot vote of the employees of the particular employer involved.

The attempt under the present legislation to limit the area of economic conflict, or to limit the class of persons who may lawfully engage in economic conflict for the betterment of their conditions, would operate to prohibit efforts of labor to improve its condition in many situations where it has heretofore found picketing and boycotting and other attempts to gain public support through publicizing the facts of a labor dispute not only helpful but vitally necessary. Thus, in the initial stage of organization labor often finds picketing necessary either to perfect organization, or finds it necessary to achieve recognition, or to combat abuses or acts of discrimination by the employer. Abuses and discrimination are of much more frequent occurrence at the early stages of organization. If labor is obliged to wait until an entire plant or a majority of an entire plant is organized before it can strike and picket, it will be unable to strike and picket or boycott, for the purpose not only of improving wages and hours

and other working conditions, or of perfecting organization, or of securing recognition, but even of protecting itself against discharges or other unfair practices by the employer.

It is entirely possible, and it has sometimes happened, that labor organizations representing a majority of employees have entered into collective bargaining agreements, which, in the opinion of individuals or minority groups, have been improvident, unwise or highly discriminatory as to these individuals or minority groups. It would be an impossibility for such minority group to persuade a majority to join with it in a strike and to engage in all the normal and natural concomitants of a strike. These minority groups, therefore, find themselves in a position wherein their right to exercise the rights of freedom of speech, press and peaceable assemblage guaranteed by the Constitution are frustrated and thwarted by the desires of a majority of employees. This again brings us back to the anomaly of that type of legislation which recognizes the exercise of a constitutional right when approved of by a majority of individuals of a particular class, but denies the exercise of these same rights to a minority group in the same class. As to the other groups and classes outside of the particular classification (that is, outside of the labor classification) there are, of course, no restrictions as to the exercise of these constitutional rights, whether by majorities or minorities. Such legislation cannot in any conceivable way be squared with the provisions of the Fourteenth Amendment to the Constitution of the United States or the decisions of this Court.

B. Section 111.06 (2) (e) of the Wisconsin Statutes and the Order Based Thereon Deny to These Petitioners the Equal Protection of the Laws, Since the Statute Does Not Embody Reasonable Classification.

Under section 111.06 (2) (e) a minority group or a majority group, not having previously balloted, when engaging in conduct therein referred to, is subject to be summoned before the Wisconsin Employment Relations Board to make answer there to the employer complaining about such conduct, whereas a majority group, having previously voted in a secret ballot in favor of a strike, engaging in the same conduct, is not so subject to the operation of the law.

A most obvious defect in such classification is indefiniteness as to numbers. A minority group may be one employee in the case of a small establishment of three employees, or may consist of four or five thousand employees, as in the case of large industrial units. Likewise, a majority group might be as little as two and as many as eleven or twelve thousand.

We are unable to find any reason in such classification. It is not a classification based upon environment, circumstances, nature of occupation, type of business, public interest involved, public health involved, public morals or safety; it has no relationship to the location of the plant or establishment, whether in an industrial or residential section, whether in a heavy traffic area or light traffic area, whether in an adequately policed area or not. It sets no definite arithmetical standard other than majority or minority. It says in one case two may do certain acts and in another case five thousand may not. It provides that in the same plant of 10,000 employees, with the same controversy over the same matters, five thousand and one may do an act, but four thousand nine hundred ninety-nine may not.

The question before discussed again presents itself—what is there inherent in the mere taking of a vote, or the failure to take a vote or the acquiescence by a majority to strike, which in the one instance presupposes that the picketing will not present a clear and present danger to the lives and property of citizens, and which, in the other instances, assumes that such clear and present danger will arise in every case of peaceful picketing?

It is clear that the Wisconsin Legislature has recognized that there is no inherent danger to the public in picketing carried on by a majority after an affirmative strike vote. The Wisconsin Supreme Court has not pointed out, nor has opposing counsel attempted to point out, any inherent difference between picketing carried on by a majority and picketing carried on by a minority who have failed to obtain a majority strike vote. Obviously, there is no such inherent difference which would permit the Legislature to presume that in one case danger to the public would never result, and in the other case such danger **would always and in every instance result.**

The Supreme Court of Oregon in **American Federation of Labor v. Bain,** 106 Pac. (2d) 544, was confronted with a statute passed by referendum vote of the people of Oregon, which likewise attempted to confine the right to picket to situations where a majority in an appropriate unit had voted to strike. The Supreme Court of Oregon found that such an attempted classification was unreasonable, had no proper relation to the purpose of the legislation, and denied to the minority group the equal protection of the laws. That Court stated in this respect as follows:

> "The law's implied recognition of the right of the majority to picket when engaged in a controversy with their employer relating to wages, hours or working conditions, is also a recognition that picketing,

peacefully conducted in those circumstances; does not give rise to 'the clear danger of substantive evils,' which alone may justify abridgment of the right. On what theory, then, can the abridgment of the right of the minority be supported? There is not inherently a difference in picketing, either with respect to the manner in which it is carried on, or the consequences to those who may be affected by it, based on the number of employees who may be disputing with their employer. On the contrary, whether engaged in on behalf of a few or many, picketing may be peaceful or otherwise for a lawful or unlawful purpose, by a single individual or en masse, and fraught with either negligible or serious consequences to the employer and the public. See **People v. Gidaly**, 35 Cal. App. (2d) 758, 93 P. (2d) 660. Besides the invalid classification which the Court found in the cited case in a similar law, the fundamental defect of the statute, in the light of the Supreme Court's decisions is, that it is not aimed at specific evils which the state without doubt has power to correct; but the prohibition, to the extent that it applies, is as broad as that condemned in the Thornhill and Carlson cases, and like the enactments there considered, 'sweeps within the ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press.'

"The fundamental constitutional right which the Supreme Court sustained in the cited cases was declared to be secured to 'every person.' We see no escape from the conclusion that the denial of such a right to the members of a minority is no less an unconstitutional abridgment of the right simply because it is saved to the majority."

This case was cited to the Wisconsin Supreme Court but not followed by it.

In the instant case it is interesting to note the Wisconsin court's remarks with respect to the argument that majority rule is a fundamental tenet of our constitutional system.

The argument is made that section 111.06 (2) (e) is merely an application of the majority rule, which is an essential part of our democracy. Attention is called to the majority rule provisions of the various labor relations acts and to the majority rule provision with respect to elections. However, this argument overlooks the very obvious fact that in those cases where the majority have made their selection the minority is, nevertheless, free to continue to exercise their constitutional rights without restraint. The Republican party today is still free to criticize all of the policies and practices of the majority-elected Democratic President. Those who did not vote for our President, while bound by the results of the election, are, nevertheless, free to express their opinions concerning his conduct of our Government's affairs and so express themselves in the hope that they may establish a majority in the next election to defeat him.

The bulwark of our democratic form of government lies in **the constitutional guaranties that any person, regardless of whether such person is a member of a majority group or not, is entitled to the free expression of his own opinions and is liable only for the abuse thereof.**

It has been stated by a prominent clergyman in criticism of attempted application of the majority rule in so far as **human rights** are concerned that this results in the substitution of arithmetic for principles principles of morality. The proof of this statement can be found in the tragic history of Europe in recent years where we find minority religious, political, and economic groups mercilessly punished and deprived of all human rights. Legislation of the type herein challenged is, in our opinion, an opening wedge to similar exploitation of minority groups in this country and is equally reprehensible.

CONCLUSIONS ON CONSTITUTIONALITY OF THE STATUTE.

Under the decisions of this Court there can be no possible justification for any statute or order under which the exercise of those rights assured by the Fourteenth Amendment to the Constitution of the United States can be made to depend upon arithmetical standard. Minority groups under our form of government have an equal right with majority groups to exercise those rights which are protected by the Fourteenth Amendment to the Constitution of the United States, and to be free from restraint by action of any arm of the state which abridges their privileges or immunities, deprives them of life, liberty, or property without due process of law, or denies to them the equal protection of the laws.

III.

THE DECISION OF THIS COURT IN THE CASE OF MILK WAGON DRIVERS OF CHICAGO V. MEADOWMOOR DAIRIES, INC., SUPRA, IS NOT APPLICABLE.

A. The Basis for the Board Order as Demonstrated by Board Decision, Circuit Court Decision and First Supreme Court Decision, Was Failure to Obtain Majority Vote and Not Violence.

The original decision of the Wisconsin Supreme Court in this case was very clearly and definitely based upon the holding that distinguishing between what a majority may do in furtherance of an authorized strike and what a minority may do in furtherance of an unauthorized strike constituted a valid exercise of the police power of the State of Wisconsin, and operated as a regulation of the right of free speech rather than a prohibition thereof.

In our opinion the Wisconsin Supreme Court on the mo-

tion for rehearing sought to place the decision upon a non-federal ground entirely, and to assert that the decision was based upon the isolated acts of mild disorder which occurred during the early days of the strike.

There is absolutely no place in the findings of the Board or in the order of the Board, nor in its memorandum decision, any holding, indication, implication, or inference of any kind whatsoever that the Board found that the activities of the union were "set in a background of violence," or that "it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful" (**Milk Wagon Drivers etc. v. Meadowmoor Dairies, Inc.**, supra).

As a matter of fact, the memorandum decision accompanying the order of the Board clearly points out that the order prohibiting picketing and boycotting is based upon the fact that

> "Before going on strike, no vote by secret ballot authorizing the strike, was taken among the employees of the hotel. This, under Chapter 111 of the Wisconsin Statutes, is clearly an unfair labor practice, and all of the employees taking part in such strike are necessarily parties to such unfair labor practice. * * * To many this result may seem to be harsh penalty, **but it is a result that flows naturally from this law, and is something which this Board as an administrative Board has nothing to do with.**" (Emphasis ours.) (R. 851, 852.)

The decision of the Board in no way characterizes the union campaign as being one so marked by violence that peaceful picketing is impossible under the circumstances. Reference to the order of the Board indicates that the findings of fact with reference to the disorders are made only to sustain the conclusion of law that the persons

named have committed unfair labor practices. **This conclusion of law** (R. 260) **does not refer to or involve the union, nor are the activities of the individually named persons attributed to the union.**

The Board specifically found in conclusions of law Nos. 2 and 3 (R. 259) that the respondent unions and their members were guilty of unfair labor practices **only by virtue of the employees having gone out on strike without first obtaining the approval of the majority by secret ballot and by co-operating in strike activities without such approval.** [See footnote (4) at p. 23 of this brief.]

The Board ordered these petitioners to cease and desist from intimidation, force, or coercion. This, however, was not tantamount to a finding of the Board that the peaceful activities engaged in by these organizations and their members are coercive, intimidating and injurious, and must, therefore, be prohibited in their entirety. **That this is not so was recognized by the Circuit Court in its grant of a qualified stay of judgment, permitting peaceful picketing activities during certain hours of the day** (R. 52-57).

Certainly if the original order were based upon a finding that the isolated acts of claimed violence engaged in were so enmeshed with the peaceful activities that it would be imminently dangerous to permit continued peaceful activities there can be no possible justification for the Court permitting such peaceful activities pending the final determination of the Wisconsin Supreme Court. The Court cannot blow hot and cold at the same time. It cannot say on the one hand that there can be no such thing as peaceful picketing in view of the circumstances, and on the other hand, however, permit peaceful picketing.

A careful examination of the findings of fact, conclusions of law, order, and memorandum (R. 846-854) fail to disclose any finding by the Board, express or implied,

that the union had ratified or authorized the conduct of such employees, or that the unions by virtue of any such authorization or ratification have committed an unfair labor practice which results in denying to them the right to peacefully picket.

Certainly, it must be apparent that the few isolated acts of disorder were not relied upon by the Board to justify the order prohibiting all picketing and all boycotting. As a matter of fact, a part of the order of the Board relates to unlawful acts and provides as follows:

> "1. Immediately cease and desist from:
>
> * * * * * * * *
>
> (b) Attempting to hinder or prevent by threats, intimidation, force, or coercion of any kind, the pursuit of lawful work by employees of the Plankinton House Company."

Therefore, it is obvious that the order prohibiting picketing and boycotting in no way and no sense was based upon any finding by the Board that conduct engaged in by some of the pickets was of such nature that all picketing and boycotting could be restrained under the decision of this Court in the **Meadowmoor** case.

The fact is that the order entered by the Board is not based in any way upon a finding or claim that the few isolated acts of mild disorder which took place the first few days of the strike so characterized the activities of the unions that the Board, in the exercise of its judgment, determined to prohibit all activities, nor could it so determine on the facts of this case. It is further apparent that the Board made no finding that these few isolated acts of disorder were such that it "could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful." (**Milk Wagon Drivers' Union of Chicago, Etc., v. Meadowmoor Dairies, Inc.**, supra).

While it is true that both the Circuit Court and the Supreme Court of the State of Wisconsin made reference in their decisions to these misdemeanors, the fact remains that neither the Circuit Court nor the Wisconsin Supreme Court had any jurisdiction other than to enforce the order of the Board. The determination of whether or not an order should be entered and the reasons for entering such order rested with the Board in the first instance.

In this connection, it is interesting to note that the Wisconsin Supreme Court in the case of **Allen Bradley Local 1111, Etc., v. Wisconsin Employment Relations Board**, 237 Wis. 164, 295 N. W. 691, in dealing with the powers and authority of the Board, pointed out:

> "As already stated, the manner and extent to which the act shall apply in a particular case pending before it is committed to the discretion of the board."

In the instant case the Board did **not** exercise its discretion to issue a restraining order on the basis of the principles enunciated in the **Meadowmoor** case.

As we understand the decision of this Court in the Meadowmoore case the only justification for the entry of an order prohibiting all picketing (the order in the instant case prohibits boycotting also) must lie in the express finding of acts of extreme violence, which are so enmeshed with and indistinguishable from the peaceful, legitimate activities that the trier of fact can come to the reasonable conclusion, supported by facts, that such complete ban is necessary to prevent similar acts of violence in the future and until the time that the momentum of fear generated by such extreme violence has appreciably declined or disappeared.

In the instant case the Wisconsin Employment Relations Board could not and did not come to such conclusion, nor did it in any way seek to justify its conclusion on that

basis. Any attempt, therefore, on the part of the Supreme Court of the State of Wisconsin to subsequently justify such order by substituting its own findings of fact or by misinterpreting and rewriting the order to conform to the **Meadowmoor case** (which decision was rendered after the decision on the motion for rehearing) must be rejected as an effort to accomplish a result which cannot be otherwise justified.

As we have pointed out in our original brief, in support of the petition for writ of certiorari, this Court does have jurisdiction to issue a writ of certiorari to a state court where any device used to support the decisions is "so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent review of the decision on the federal question" (**Leathe v. Thomas**, 207 U. S. 92, 99; **Ohio State Bank v. Bryan**, 282 U. S. 765, 774; **Johnson v. Risk**, 137 U. S. 300, 307).

B. Assuming That Violence Was the Basis for the Order Prohibiting All Picketing and Boycotting, Such Order Cannot Be Supported by the Facts.

In the **Meadowmoor** case it was clear that the injunction of the court below was prompted by a situation of **unusual** and **extraordinary** violence from which it "could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful," and which acts of violence were "neither esoteric nor isolated."

This Court also made it abundantly clear, however, that constitutional freedom was not to "be defeated by insubstantial findings of fact screening reality," and that, therefore, "this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made." This Court pointed out that

"the right of free speech cannot be denied by drawing from a trivial, rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force."

Accepting the findings of fact by the State Board as a verity in the instant case we find that the strike occurred on November 2, 1939, and that hearing was had before the Wisconsin Employment Relations Board beginning with the 1st day of December, 1939. From November 4 through November 17, 1939, six pickets were arrested and fined in police court on charges of assault and battery, and on two occasions deliveries to the Plankinton Hotel were prevented by pickets by means of force (R. 257-259). The entire findings of the State Board in respect to violence appear on pages 257 to 259 of the record, as set forth in footnote[3] below. **In all there were seven incidents on four days.**

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3. 19. On November 4, 1939, union pickets, by means of force, prevented delivery to the Plankinton House of floral decorations by one Joseph Mueller, an employe of August F. Kellner Company. That as a result of the altercation at said time Jack Heisdorf, vice-president of Local No. 122, Hotel and Restaurant Employees International Alliance, and Charles McLaughlin, assistant to the secretary of Local No. 122, were arrested and on November 17, 1939, convicted of assault and battery, McLaughlin being fined $10.00 and costs and Heisdorf being fined $5.00 and costs, the sentence against Heisdorf being suspended and he was placed on probation for thirty days. That Local No. 122 provided counsel and bail for both Heisdorf and McLaughlin and paid McLaughlin's fine.

20. Charles McLaughlin returned to the picket line immediately after his arrest, and on November 17, 1939, assaulted one Lester Raasch, an employe of the Plankinton House, was again arrested, convicted and fined $25.00 and costs and the union again provided him with counsel and paid such fine.

21. On November 4, 1939, two salesmen representing the Automotive Electrical Association, who were attempting to deliver displays and samples to the Plankinton House, were, by means of force, prohibited from making the delivery by Phil L. Valley and a number of pickets.

22. On November 10, 1939, Jack Heisdorf, Charles Alden, striking employe of the Plankinton House, and other pickets, by the use of force prevented delivery of ice cubes to the Plankinton House, and in the course of the attempted delivery Charles Alden assaulted Robert Jeske, then an employe of the Plankinton House.

23. On November 17, 1939, Paul Ziebell, an employe of the Plankinton House, was assaulted by James O'Brien, a picket employed by the union and stationed on the picket line at the Plankinton House. O'Brien was arrested, convicted and fined five dollars and costs.

24. On November 14, 1939, Edward Knopf, an employe of the Plankin-

Examination of the record upon which these findings are based discloses the following:

Finding 19 is predicated upon testimony that the delivery man had some bittersweet knocked from his hand, but that no personal violence of any kind was inflicted upon any person (R. 102, 103).

With respect to finding 20, the record discloses that the assault on the employee was occasioned by the assertion of the pickets that the employee used physical violence on two girls in the picket line (R. 138). In this connection it is also pertinent to note that the union member involved in the assault mentioned in finding 20 was reprimanded by the executive board of the Hotel and Restaurant Workers' Union (R. 92), and was forbidden from again appearing on the picket line (R. 97-99).

With respect to finding 21, the only testimony to support such finding is that the officer of the union pushed the hand of one of the delivery men (R. 140).

With respect to finding 22, it is pertinent to note that there was a general altercation, provoked by the action of ten nonstriking employees, who knocked down two pickets (R. 93, 94).

The picket referred to in finding 23 was not a member of the union, was not authorized to appear on the picket line, and was forbidden to again appear on the picket line after the offense was called to the attention of the union (R. 97, 98).

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ton House, was assaulted by John Thomas O'Maher, a picket stationed by the union at the Plankinton House, and a striking employe of the Plankinton House.

25. On November 17, 1939, Rudolph Stano, an employe of the Plankinton House, was assaulted by Joseph Hofich, a picket stationed at the Plankinton House by the union, and Hofich was arrested, convicted, and fined five dollars and costs.

26. On November 17, 1939, Thomas James, an employe of the Plankinton House, was assaulted by Larry McAllen, a picket stationed at the hotel by the union, and fined five dollars and costs.

The altercation referred to in finding 24 apparently was the result of a personal controversy between two employees which antedated the strike (R. 145).

The incident referred to in finding 25, according to the claim of the picket, was provoked by the assaulted non-striking employee (R. 144).

It is further pertinent to note that those members who got into difficulties when on the picket line were reprimanded by the union, and were warned against repetition at the risk of loss of membership (R. 94-99, 217-222).

In the brief in opposition to the petition for certiorari the Attorney-General enumerated instances of violence, a number of which do not appear in the findings of fact made by the Board. Examination of the record discloses that such testimony was permitted by the Board over the objections of the union, but **subject to proof being later adduced connecting such events to the union** (R. 146-147, 156, 157). **No such proof was subsequently adduced**, and consequently the Board made no findings with respect to those instances. Counsel for the Wisconsin Employment Relations Board, therefore, goes outside of the findings of fact made by the Board in an effort to bolster the contention that the facts in this case bring the case within the rule announced in the Meadowmoor case.

These events, however, were not in any way or manner attributable to the union, and it is manifestly unfair for the Attorney-General of the State of Wisconsin to comb the record for the purpose of finding whatever remote unsupported fact he can for the purpose of discrediting the union, and in an effort to bring the instant case within the decision of this Court in the **Meadowmoor** case.

Similarly, the Attorney-General emphasized at page 18 of his brief in opposition to the petition for writ of certiorari that a police captain testified to the number of

arrests and convictions; but does not inform this Court that this testimony merely summarized the findings which were set forth in detail on pages 15 to 17 of the brief.

Also, the activities of the union are referred to as constituting violence, crimes and misdemeanors, when, in fact, the proceedings which resulted in fines were civil proceedings for the purpose of collecting a penalty for violation of city ordinances (**Milwaukee v. Johnson,** 192 Wis. 585, 213 N. W. 335).

The fact remains that there were exactly seven incidents which even remotely resembled disorders in a strike involving over 188 employees, with picketing conducted twenty-four hours a day at two hotels having five entrances and located in downtown Milwaukee, three of which incidents occurred on November 4, 1939, two days after the commencement of the strike, and the remainder of which occurred between November 5, 1939, and November 17, 1939 (R. 257-259). The hearing before the Wisconsin Employment Relations Board was held on December 10, 11, 12, 13 and 14, 1939 (R. 9). The State Board did not and could not find any unlawful acts having occurred between November 17th and December 14th. **Note particularly the testimony of the police captain that the police department "has been able to maintain order very, very adequately"; that it had "the situation very well in hand," and that the pickets conducted themselves "very orderly"** (R. 197-198).

It is on the basis of this showing that it is now claimed, although not found by the trier of fact, that the injunction can be supported under the doctrine enunciated by this Court in the **Meadowmoor** case, which involved

> "more than fifty instances of window-smashing; explosive bombs caused substantial injury to the plants of Meadowmoor and another dairy using the vendor system and to five stores; stench bombs were dropped

in five stores; three trucks of vendors were wrecked, seriously injuring one driver, and another was driven into the river; a store was set on fire and in a large measure ruined; two trucks of vendors were burned; a storekeeper and a truck driver were severely beaten; workers at a dairy which, like Meadowmoor, used the vendor system, were held with guns and severely beaten about the head while being told 'to join the union'; carloads of men followed vendors' trucks, threatened the drivers, and in one instance shot at the truck and the driver. In more than a dozen of these occurrences, involving window-smashing, bombings, burnings, the wrecking of trucks, shootings, and beatings, there was testimony to identify the wrongdoers as union men."

Those are the facts which this Court held supported the injunction in the **Meadowmoor** case. Contrast those facts with the record in the instant case, and it becomes readily apparent that there is no basis whatsoever for any argument that the cases are parallel and call for application of the same principles. In the instant case there are six or seven simple assaults and nothing more. The entire situation was well within the control of the police authorities. Those assaults which did occur were immediately submitted to the police court for determination, and those assaults ceased approximately two weeks before the hearings commenced before the State Labor Board. They have not been repeated in the two years since.

Certainly, by no stretch of the imagination could such fugitive encounters, occurring only in the early days of the strike, when feelings usually run highest, be held to justify a complete restraint on all peaceful picketing and boycotting activities in the future. The Wisconsin Employment Relations Board did not so hold, but the Supreme Court of the State of Wisconsin, in the opinion

rendered on the motion for rehearing apparently sought to justify the prohibition on such grounds. We say "apparently" since the decision on the motion for rehearing merely further obscured an already obscure and evasive opinion.

In such case it still rests with this Court "to enforce constitutional liberties even when denied through spurious findings of fact in a State court." (**Meadowmoor** case.)

It was aptly stated in the case of **Great Northern Railway Co. v. Local Great Falls Lodge of I. A. of M.**, 283 Fed. 557:

> "These controversies (dispute between employer and employee) inevitably present provocative situations, and may involve encounters and disorders for which neither party may be solely responsible. Often trivial, they do not threaten irreparable injury and so do not warrant interposition by a court of equity, but can be adequately remedied by appeal to local authority."

See, also, **Great Northern Ry. Co. v. Brosseau**, 286 Fed. 414.

Similarly, in the case of **Republic Steel Corporation v. National Labor Relations Board**, 107 Fed. (2d) 472 (C. C. A. 3) it was stated:

> "We think it must be conceded, however, that some disorder is, unfortunately, quite usual in any extensive or long drawn-out strike. A strike is essentially a battle waged with economic weapons. Engaged in it are human beings whose feelings are stirred to the depths. Rising passions call forth hot words. Hot words lead to blows on the picket line. The transformation from economic to physical combat to those engaged in the contest is difficult to prevent even when cool heads direct the fight. Violence of this nature, however much it is to be regretted, must have been in the contemplation of the Congress when

it provided in Section 13 of the Act (National Labor Relations Act, 29 U. S. Code, paras. 151 to 160) that nothing therein shall be construed so as to interfere with or impede or diminish in any way the right to strike. If this were not so the rights afforded to employees by the act would be indeed illusory * * *."

Human experience aptly demonstrates that a few fugitive encounters on the picket line in the early stages of a strike can no more be controlled or prevented by responsible leaders of organized labor than can the sun be stopped in its course. The intensity of emotion, the livelihood that is at stake, the desire to protect a job for oneself and one's dependents, all inject into strikes and picketing such elements that must of necessity in some cases and in the early days of a strike, when feelings naturally run high, lead to some cases of spontaneous eruption. Surely these are not the activities that this Court meant when it referred to "the continuance and recurrence of flagrant violence." (**Meadowmoor** case.)

To penalize workingmen by depriving them of the constitutionally guaranteed right of free speech because of occasional excesses indulged in by a few workers of more volatile emotion (many of which excesses are instigated or provoked by others, as demonstrated in the reports of the Senator La Follette Investigating Committee) is indeed to exact a price all out of proportion to the value of the rights at stake.

C. The Wisconsin Employment Relations Board Did Not Find That These Acts of Violence Are Attributable to the Unions or That the Unions as Such Are Responsible Therefor.

It is particularly pertinent to note that, although the Wisconsin Employment Relations Board made specific findings of fact as to minor disorders and named the per-

sons who committed such disorders, no place in the findings of fact or in the conclusions of law does there appear any finding by the Board that such actions were authorized by these petitioning unions.

The only action which the Wisconsin Employment Relations Board deemed proper was to make a finding that the individuals named committed unfair labor practices by virtue of their own offenses. Under any view of the case, therefore, there is no possible basis to support the order prohibiting the unions and their members from engaging in peaceful activities in the future.

IV.

THE ORDER IS MORE COMPREHENSIVE THAN NECESSARY OR PROPER UNDER THE DOCTRINE OF THE MEADOWMOOR CASE.

In the **Meadowmoor** case this Court repeatedly emphasized that the injunction therein justified itself because of the **extreme case of violence** therein presented to the Court. This Court was careful to point out that an injunction which is based upon extreme and flagrant cases of violence must, nevertheless, be directed only to those activities which can reasonably be associated with violence. This Court pointed out that there was no justification in the **Meadowmoor** case to anticipate that the injunction therein sustained would be put to "abnormal uses."

This Court also stated that it was not proper in that case to

> "generalize the terms of an injunction derived from and directed toward violent conduct as though it were an abstract prohibition of all picketing wholly unrelated to the violence involved."

In the instant case we do have an injunction which is a complete prohibition of all picketing and of all boycotting

which would include in its broad meaning all other means of communication wholly unrelated to the violence involved. The prohibition against "boycotting in any way the Plankinton House Company" is as all-inclusive and general an interdiction as could be imagined.

The instruments of boycott are many and varied. They may range from the picket line to the distribution of circulars; the carrying of placards throughout the streets; announcements made on the radio; the publication of "unfair lists"; the writing of letters, and oral persuasion.

Prohibiting all forms of boycotting, therefore, cannot in any way be related to any claim that violence on the picket line is such that all the other instrumentalities of boycotting are tainted thereby and are enmeshed with such violence.

We, therefore, have in the instant case an order which is not at all limited in any reasonable or proper manner. The order by its very terms prohibits every conceivable type of activity which labor organizations might engage in for legitimate purposes.

Your petitioners, in arguing before the Supreme Court of the State of Wisconsin, urged that the terms "picketing" and "boycotting" were unnecessarily vague and so comprehensive that your petitioners were not completely apprised of what conduct could and could not be engaged in, and, further, that the terms necessarily include action which fell within the protection of the constitutional guarantee of free speech. In its decision the Supreme Court answered this argument by stating:

> "While it is true that the terms 'picketing' and 'boycotting' are not terms of definite legal content, they are descriptive of a process well known to the law, and when considered in connection with the other provisions of Chapters 111 and 103, Stats. 1939, the meaning of these terms becomes reasonably certain."

Here was not an attempt to circumscribe the meanings of these terms to a limited situation relating to violence, but rather a recognition of the practically unlimited scope of such terms. For instance, section 103.53, referred to by the Court, enumerates the following activities, among others:

> "(e) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace or threat thereof.
>
> • • • • • • • • •
>
> "(g) Assembling peaceably to do or to organize to do any of the acts heretofore specified or to promote lawful interests.
>
> "(h) Advising or notifying any person or persons of an intention to do any of the acts heretofore specified.
>
> • • • • • • •
>
> "(j) Advising, urging or inducing without fraud, violence, or threat thereof, others to do the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103.52; and
>
> • • • • • • • •
>
> "(l) Peaceful picketing or patrolling, whether engaged in singly or in numbers, shall be legal."

Therefore, by the Court's own construction of the order the activities which are banned (they include all of the above) embrace almost every conceivable action which would fall within the protection of the right of free speech.

We, therefore, have in the instant case a prohibition which is as broad and as comprehensive a prohibition on the right of free speech as one might possibly conceive of. Certainly if it is the **Meadowmoor case**, which it is claimed

will support the injunction herein, the injunction is, nevertheless, much more comprehensive than the circumstances warrant. The writing of letters urging prospective customers not to patronize the hotel certainly does not bear such close and intimate relationship to the acts of violence which have previously occurred which would justify the restraint upon such exercise of the right of free speech. Yet the order does by its very terms prohibit such conduct.[6]

It is respectfully submitted that under no circumstances, for no reason, and under no theory known to law can an order as broad as the instant one be sustained.

Conclusion on Purported Applicability of Meadowmoor Case.

It is regrettable that the **Meadowmoor** decision of this Court has been utilized by justices who have refused to accept the principles pronounced in the Norris-La Guardia Act and in the **Swing** case, or who have sought to construe statutes to death for the purpose of overcoming and defeating the decisions of this Court in the **Thornhill, Carlson** and **Swing** cases.

In fact, justices with a clearer vision and more ready desire to accept the United States Supreme Court pronouncements have had occasion to direct the attention of their brethren of such aptitude to misapply the **Meadowmoor** case. Justice Lehman, Chief Justice of the New York Court of Appeals, in **Opera on Tour, Inc., v. Weber**, 34 N. E. (2d) 349 (N. Y.); Justice Farthing of the Illinois Supreme Court, in **Ellingsen v. Milk Wagon Drivers Union of Chicago, Local 753**, 35 N. E. (2d) 349 (Ill.), and

[6] The petitioning unions, their officers, members and agents were ordered not only to cease and desist from promoting or inducing picketing at or near the Plankinton House, but also from "(c) boycotting in any way the Plankinton House Company." (Emphasis ours.)

2063 Lawrence Avenue Building Corporation v. Gust Van Heck, 35 N. E. (2d) 373 (Ill.).

Unless the justices so disposed not to follow the decisions of the United States Supreme Court are curbed in their predilections, the Norris-La Guardia Act and other prototypes will suffer the same fate as did the Clayton Act. This Court only recently had occasion to make known to the courts of the States of New Jersey, Illinois and New York that they must be bound by the interpretations of the United States Constitution placed on it by the United States Supreme Court (**Miller v. Journeymen Tailors' Union**, 61 Sup. Ct. 632; **American Federation of Labor v. Swing**, 61 Sup. Ct. 568; **Wohl and Platzman v. Bakery & Pastry Drivers & Helpers' Local 802**, 85 L. Ed. [Adv. Op.] 998).

We repeat that it is regrettable that after the plain and clear decisions of this Court in the **Senn, Thornhill** and **Carlson** cases it should, nevertheless, have become necessary for the Court to reverse the New York Court of Appeals in the **Platzman** case, the New Jersey court in the **Miller** case and the Illinois court in the **Swing** case. In our opinion this demonstrates a reluctance on the part of many state courts to accept the principles enunciated by this Court when the acceptance of such principles means that their own economic predilections must give way.

We, therefore, respectfully submit that any effort to pervert the decision in the **Meadowmoor** case so as to hold it applicable to the circumstances disclosed by the record in the instant case, for the purpose of restraining the exercise of free speech, must be rejected by this Court so that the message may go out to the country that the exercise of constitutional rights in this democracy is not going to be made dependent upon either the economic predilections of the legislatures or courts of the states, but, as

Justice Black and Justice Reed point out in the **Meadowmoor** case, constitutional guaranties must remain inviolate.

V.

ANALYSIS OF DECISION OF THE WISCONSIN SUPREME COURT DISCLOSES THE COMPLETE FALLACY THEREOF.

Examination of the opinion of the Wisconsin Court demonstrates that such decision concerns itself chiefly with the attempt to distinguish the controlling opinions in the cases of **Thornhill v. Alabama**, 310 U. S. 88; **Carlson v. California**, 310 U. S. 106 (rehearing denied 60 Sup. Ct. 1072), as well as the **Bain** case in Oregon, 106 Pac. (2d) 544. In this attempt to distinguish and to justify the decision of the Court there emerge in the first part of the opinion five pairs of contrasting concepts. It was the opinion of the Wisconsin Court, apparently, that in the difference between these concepts lies the difference between section 111.06 (2) (e) and other comparable legislation which has been declared void by the Supreme Court of the United States.

As we read the decision, the Court found that section 111.06 (2) (e) differs from and must be given entirely different treatment than the legislation considered by this Court in the **Thornhill** and **Carlson** cases and by the Supreme Court of the State of Oregon in the **Bain** case, for the following reasons:

1. In those cases the legislation dealt with the action of individuals. In the instant case it deals with "collective" or "concerted" activities.

2. In those cases the Court had before it absolute prohibitions of the right of free speech. In the instant case such absolute prohibition to a minority is called regulation.

3. In those cases the exercise of rights guaranteed

by the Constitution were by legislative declaration termed "unlawful" acts, while in the instant case we are dealing with "unfair" labor practices."

4. The term "picketing," as used in the **Thornhill** case, differs in meaning and scope from that term as it is used in section 111.06 (2) (e).

5. In the instant case the Legislature has not prohibited the right to strike, but has divided strikes into authorized and unauthorized activities, permitting the exercise of constitutional rights in the one case and prohibiting it in the other.

In the Court's explanation and exposition of the above concepts, in the Court's contrasting of the differences of those concepts, and in the Court's application of those concepts to the instant case, lies the basis for the Court's decision.

We discuss those concepts seriatim:

1. Individual v. Co-Operative Action.

The Wisconsin Court sought to distinguish the statute involved in the **Thornhill** case from the statute in the instant case:

> "As construed by the state court it (the Alabama Statute) prohibited the publicising the facts of a labor dispute, either by printed sign, by pamphlet, by word of mouth, or otherwise. The Peace Act deals with concerted action in carrying on an unauthorized strike by the usual overt acts concomitant of a strike" (Supp. R. 55).

What the court did **not** point out was that the Peace Act, in dealing with this concerted action in carrying on an "unauthorized" strike, prohibits and did prohibit in the instant case the publicising of the facts of a labor dispute in a peaceful and truthful manner by printed sign, by pamphlet, by word of mouth, or by any other of the usual "overt concomitants of a strike."

That is exactly what the statute in the instant case prohibits. That is exactly what the order of the State Board prohibits, and that is exactly the conduct which the Wisconsin Supreme Court prohibited by its affirmance of the judgment of the Circuit Court, enforcing the order of the Board.

The Court seeks to justify this result by stating that the act does not apply to individuals, but to concerted action; that it is the co-operating feature of the act which becomes important (Supp. R. 56). Later in the decision the Court again states that section 111.06 (2) (e) does not invade the right of freedom of speech because "the right of the individual to freedom of speech is by the terms of the act left unimpaired. It is the right to **concert** of action that is regulated" (Supp. R. 64). (Emphasis ours.)

Conclusive on this point are the **Thornhill** and **Carlson** cases, supra, which sustained not only the right of the individual, but also the right of groups and organizations of individuals, to engage in activities protected by the Fourteenth Amendment from abridgment by the states. An examination of those decisions discloses that this Court was not dealing with individual rights solely, but was specifically and of necessity speaking of group rights as well.

In the **Thornhill** case the statute involved which was to be tested on its face was directed to "any person or **persons**"; Thornhill on the morning of his arrest was "in company with six or eight other men" "on the picket line"; almost all of 100 employees were on strike and a picket line had been maintained constantly; that fact that it was possible to infer that "petitioner was in the company of six or eight others when the conversation took place" was said by the Supreme Court to be "not material in our view of the case" (Footnote 6).

In the **Carlson** case "appellant was one of a group of 29 men engaged in picketing," many of whom, including the appellant, carried signs reading "This shop is unfair to C. I. O."

From the above facts in the **Thornhill** and **Carlson** cases it is apparent that this Court did not have before it the question of individual rights as distinct from group rights or "concerted" activities or "co-operative" activities. An examination of the decision demonstrates that it is rather the exercise of rights "co-operatively" and in "concert" which this Court emphasized.

Preliminarily it was pointed out in the **Thornhill** case that the statute made no exception as to the "number of persons engaged in the prohibited activities." The qualification "without just cause or legal excuse" was dismissed as not having "any ascertainable meaning either inherent or historical." It was pointed out that "employees or others" may be convicted of the offense and that the statutory regulation challenged in the case infringes "upon the right of employees effectively to inform the public of the facts of a labor dispute."

This Court quoted with approval and affirmed the statement in the **Senn** case that "**members of a union** might, without specific statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."

It was emphasized that the activities prohibited by the statute embraced "nearly every practicable, effective means whereby **those** interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute."

In addition to the above direct references to group action, concerted and co-operative, the entire decision

breathes with the true spirit of democratic ideals—the right of individuals to band together, to co-operate one with the other, to engage in concerted activities for the attainment of their lawful objectives by lawful means. All public policy indicates that protection of workers in group action for "mutual aid and protection."

If an individual has a right to express himself in a peaceful and orderly manner, then certainly more than one individual acting in concert have a right to express themselves in a peaceful and orderly manner. Only when the numbers engaging in such activities become so great or become so disorderly that laws are violated can such right be denied to them. Section 111.06 (2) (e) obviously is not confined to that situation, and bears no relationship at all to the possibility of breaches of the peace, violations of the law, or disorders of any kind.

If the Wisconsin Court is right in upholding the Legislature in prohibiting the right of free speech on the ground that concert of action takes such conduct out of the protection of the Fourteenth Amendment, then it must also uphold the right of the Legislature to prohibit religious worship when engaged in by any particular group or sect in a common meeting-place and for common spiritual purposes.

If the Wisconsin Court is right in this case then the Legislature may say to the individual citizens, "we recognize and honor your **individual** right to religious worship, but we deny you such right if you seek to worship in **concert with others.**"

After all, isn't that what the Wisconsin Court said when it sought to distinguish section 111.06 (2) (e) on the ground that it deals with the **concerted peaceful exercise** of a constitutional right rather than with the **individual** exercise of such right?

Concerted Minority Action v. Concerted Majority Action.

There is a further fallacy in the attempt to distinguish section 111.06 (2) (e) by asserting it deals with concerted activities rather than individual activities. Upon what basis can the Legislature provide that concerted activities by a **minority** group constitute "unfair practices" and are subject to prohibition while the identical concerted activities by a **majority** are valid and free from restraint? What reasonable basis is there for this division of **peaceful concerted** activities into permissible majority action and prohibited minority action? Search as diligently as we might we cannot find any place in the decision of the Wisconsin Court any possible basis for this classification.

2. Prohibition v. Regulation.

There is contained in the **Thornhill** case the very reasonable and logical declaration that, although a state may not restrain the right of free speech, it may, nevertheless, adopt such legislation as will "preserve the peace, and protect the privacy, the lives and the property of its residents."

The Wisconsin Court, in upholding the validity of section 111.06 (2) (e), stated in its opinion that we have in the instant case the type of regulation referred to in the **Thornhill** case.

In the decision it is stated that the Peace Act does not forbid picketing, but, rather, "attempts to regulate it and to provide under what conditions and circumstances picketing may be carried on by striking employees." It is further pointed out that violation of the act is "merely" an unfair labor practice.

The Court completely overlooked in its attempt to

classify this legislation as regulatory rather than prohibitory, the fact that the statute, on its face, the order by its terms, and the decision of the Wisconsin Court result in an absolute denial to these petitioners and to their membership of the right to publicize the facts of their dispute and disagreement with the respondent hotels. There can be no equivocation about this, and there is no sense in quibbling. One cannot just say, "I am taking away from you all of your rights, but I am not prohibiting such rights. When I do so I am merely regulating them."

It was stated by this Court in the **Thornhill** case:

> "The state urges that the purpose of the challenged statute is the protection of the community from the violence and breaches of the peace, which, it asserts, are the concomitants of picketing. The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives and the property of its residents cannot be doubted. But no clear and present danger of destruction of lives and property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter. We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger. Compare **American Foundries v. Tri-City Council**, 257 U. S. 184, 205. Section 3448 in question here does not aim specifically at serious encroachments on these interests and does not evidence any such care in balancing these interests against the interest of the community and that of the individual in freedom of discussion on matters of public concern."

The foregoing quotation answers the argument that the

Peace Act differs from the Alabama Act, because the former only regulates picketing, while the latter prohibits it. Obviously, there is and can be no distinction between "regulation" which has the necessary effect of prohibition and legislation which prohibits. As stated by the Oregon Court in the **Bain** case:

> "In considering constitutional questions the courts look through forms to the substance of things. It is not important, therefore, whether we call the statute one of prohibition or regulation."

It is clear that the **Thornhill** decision is predicated on no such fine distinction between prohibitory and regulatory legislation, and that the language of this Court has reference to all legislation which has the effect of preventing or restraining "the dissemination of information concerning the facts of a labor dispute." Any impairment or diminishing of the effective exercise of this right must be struck down. As stated by this Court:

> "Mere legislative preference for one rather than another means for combating substantive evils, therefore, may well prove an inadequate, foundation on which to rest regulations which are aimed at or **in their operation diminish the effective exercise of rights** so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations." (Emphasis ours.)

3. **Unlawful Acts v. "Unfair Labor Practices."**

In its decision the Wisconsin Court relied on the fact that we have here involved an "unfair labor practice" rather than an unlawful act. The Court seems to think that because in the **Thornhill**, **Carlson** and **Bain** cases certain acts were called misdemeanors rather than "unfair

labor practices," and, therefore, the pickets in those cases were subject to criminal penalties, there is sufficient basis for distinction in the instant case. We fail to see how the distinction justifies the legislation.

In the instant case the commission of an unfair labor practice subjects the person to more stringent punishment than the commission of the misdemeanor in the **Carlson** or **Thornhill** cases. Upon the commission of a misdemeanor one is subject to fine and imprisonment. In each case, the penalty exacted by the law is commensurate with the magnitude of th offense.

Under the Wiscon a statute if one commits an "unfair labor practice" by peacefully exercising the right of free speech assured by the Constitution of the United States, one is subject to complete and perpetual restraint from ever exercising again that right of free speech unless he subsequently is licensed by the majority to do so. The right to picket and to boycott, identified with free speech in the **Thornhill** case, are denied to the appellants in the instant case under the decision of the Wisconsin Court.

Further than that, as a result of being found guilty of unfair labor practices, employees lose their status of employees under the act and are consequently deprived of the rights, privileges and immunities afforded by the act to other employees [sec. 111.02 (3) and 111.97 (4)]. Gone is the right to vote, participate in the designation of representatives, and to be protected from discharge because of union activity or affiliation. The Wisconsin Supreme Court in its decision expressly stated that when it is found that any person has committed an unfair labor practice under the Wisconsin law such person loses the benefits of Section 103.53, Stats. 1939 (some of which provisions are set forth herein at page 53) and loses the status of employee as well as the rights, immunities, privileges or

remedies granted or afforded by chapter 111. Here then, under the holding of the Wisconsin court, we do not have merely the attachment of a stigma that one has committed an unfair labor practice but a deprivation of the status of employe, a cancellation of any rights which one may have as an employee, and a complete prohibition on the exercise of constitutional rights.

In our minds, and we venture to say in the minds of the justices of this court, that type of penalty is more burdensome and more severe than any fine or imprisonment could possibly be.

What the Wisconsin court has said in this attempted distinction between unfair labor practices and unlawful acts is that the State may not fine or imprison one for exercising the right of free speech, but the State may prohibit one from continuing to exercise that right. Certainly the latter is at the very least as reprehensible as the former.

The Board Order Constitutes a Restraint on the Exercise of Constitutional Rights, Even Though Not Self-Executing.

In line with the foregoing is the argument of the Wisconsin court that the Peace Act is not self-operative; that violators merely commit unfair practices; that the statute itself does not subject them to fine or imprisonment. No further answer is necessary other than to point out that upon failure of any individual to obey an order of the Board, the Board is empowered to obtain an order from the Circuit Court enforcing its order, and that the order of the Circuit Court is enforceable by contempt proceedings which may involve fine or imprisonment. It is the mere threat or fear of subsequent punishment because of the doing of a lawful act, or the exercise of a constitu-

tional right, such as the right to free speech, which abridges or diminishes the free or effective exercise of that right. The constitutional right to freedom of speech is not one which can freely be exercised when there is a continuing threat that, if exercised, the person exercising the right will be subjected to court proceedings, contempt orders, and fine or imprisonment. As was said by this Court, "The freedom of speech and of the press, guaranteed by the Constitution, embraces at the least the liberty to discuss publicly or truthfully all matters of public concern **without previous restraint or fear of subsequent punishment.**" (**Thornhill** case.)

If, as stated by this Court in the **Thornhill** case:

> "Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society,"

then that right must be exercised without the restraint of a Board order.

4. The Term "Picketing," as Used in the Thornhill Case, as Distinguished From That Term as It Is Used in Section 111.06 (a) (e).

The greatest difficulty we have had with the decision of the Wisconsin Supreme Court is its attempted distinction between the term "picketing," as used in the **Thornhill** case, and the term "picketing," as used in section 111.06 (2) (e), with the ultimate mandate of the Court that the order be affirmed in its entirety without modification. The Wisconsin Court states:

> "The term 'picketing,' as used in subsection (e), does not include acts held in the **Thornhill** case to be within the protection of the constitutional guaranty of the right of free speech."

We assume from this statement that we have a right, then, to look to the **Thornhill** case for the purpose of determining what activities were included within the term "picketing" in that case.

In the **Thornhill** case the statute prohibited "loitering or picketing * * * for the purpose or with the intent of influencing or inducing other persons not to trade with, buy from, sell to, and have business dealings with or be employed by such persons, firm, corporation, or association * * *"

The United States Supreme Court stated:

> **"The range of activities prescribed by section 3448, whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute. The safeguarding of these means is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern."**

Using the Wisconsin Court's own test, the term "picketing," as used in section 111.06 (2) (e), should not, therefore, include "nearly every practicable, effective means whereby those interested * * * may enlighten the public on the nature and causes of a labor dispute."

Yet the order of the Board in the instant case, as affirmed by the Wisconsin Court, prohibits these appellants, and each of them, from engaging in, promoting, or inducing picketing at or near the Plankinton House or the Kilbourn Hotel, and from boycotting in any way the Plankinton House Company. Certainly this order proscribes every conceivable affective means which labor organizations and employees have of advising the public about their particular dispute with the employer or with the employees of the employer.

Further than that, the state court has ignored the caveat of the **Thornhill** decision that the statute must be tested on its face. Section 111.06 (2) (e) includes the prohibition against "any other overt concomitant of a strike." Does not the statute then prohibit, and has not the order of the Board prohibited, those activities which in the **Thornhill** case were included within the term "picketing"?

The order, on the face of it, is all-inclusive, and refers to all boycotting and all picketing, no matter how carried on, in what circumstances, or through what medium. It cannot be supported under any theory of law.

5. "Authorized" as Distinguished From "Unauthorized" Strikes.

The conflict between the Court's division of strikes into "authorized" and "unauthorized," and the results which flow therefrom, and the decision of this Court in the **Thornhill** and **Carlson** cases, as well as in the cases of **Snyder v. Milwaukee**, 308 U. S. 148, and **Lovell v. City of Griffin**, 303 U. S. 444, can be more graphically demonstrated if we substitute the word "license" for the word "authorized." The two are synonymous.

Using the term "licensed" we have the Wisconsin Court stating that we may have licensed and unlicensed strikes; that in the unlicensed strike the employer-employee relationship is terminated, and the third party (ex-employee) has lost the right to engage in free speech. The "licensing" is all-controlling.

Yet this Court stated in the case of **Lovell v. City of Griffin**, 304 U. S. 444, that the right of free speech is absolute, and is not subject to license. In **Snyder v. Milwaukee**, 308 U. S. 141, it was stated that the right of free speech is absolute, and not subject to prohibition under the purported exercise of the police power. In the **Thorn-**

hill, Carlson and **Swing** cases the right to inform the world by picketing, by placard, by pamphlet, or radio, or by word of mouth about the fact surrounding the employment relationship or the employment conditions, regardless of whether or not the person who is informing the world is an employee or third party, was held not subject to restraint by a municipality or state.

Therefore, whether a strike is "authorized" or not, and regardless of whether there is a strike or not, the right of employees or non-employees to publicize the true facts surrounding the employment relationship may not properly be made subject to the granting of a license by a majority of the employees.

THE LEGISLATURE MAY NOT BY THE "UNAUTHORIZED STRIKE" DEVICE PROHIBIT OR RESTRAIN THE EXERCISE OF CONSTITUTIONAL RIGHTS.

The Legislature cannot by the adoption of artificial devices prevent or prohibit the exercise of constitutional rights. For instance, it could not classify literature as pornographic when in truth and in fact it is not pornographic, and by such device prohibit the distribution of such literature. Similarly, it cannot classify as immoral, religious practices which are in truth and in fact not immoral, and thereby prohibit the exercise of the right to religious worship.

Similarly, it cannot, as it has done in the instant case, classify certain strikes as illegal, and by that means prohibit and prevent the exercise of free speech in furtherance of such strike when there is nothing innately illegal or reprehensible about such strike or such activities. See **United States v. Carolene Products Company**, 304 U. S. 144, 82 L. Ed. 1234, holding:

"We may assume for present purposes that no pro-

> nouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis."

To forbid picketing or boycotting because in aid of an unauthorized strike is to make such picketing and boycotting depend upon "authorization" for the strike. Authorization for the strike comes only by a secret ballot in which a majority vote in favor thereof. When this majority has **licensed** a strike the exercise of free speech is permitted. **When this majority refuses to license the strike the exercise of the constitutional right is prohibited.** What the majority does then is act as a licensor of the right to exercise constitutional rights. This is directly contrary to the decision of this Court in the **Lovell** case, 303 U. S. 444, wherein it was stated:

> "The struggle for the freedom of the press was primarily directed against the power of the licensor * * * and the liberty of the press became initially a right to publish "**without** a license what formerly could be published only **with one.**' * * * Legislation of the type of the ordinance in question would restore the system of license and censorship in the boldest form."

CLASSIFICATION OF "AUTHORIZED" AND "UNAUTHORIZED" STRIKE BEARS NO RELATIONSHIP TO THE POLICE POWERS.

This also raises the question of whether the circumstances in an "unauthorized" strike situation, as defined by the Legislature, are such as to reasonably permit a presumption that imminent and actual danger to life and property is inherent in all picketing in such situation. It

must be remembered that the **Thornhill** case states that it is only in certain situations that the prohibiting of picketing may be constitutional. It is stated:

> "Abridgment of the liberty of such discussion can be justified only where the **clear danger of substantive evils arises** under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."
>
> * * * * * * *
>
> "But no **clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace** can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter. We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger. Compare **American Foundries v. Tri-City Council**, 257 U. S. 184, 205. Section 3448 in question here does not aim specifically at serious encroachments on these interests and does not evidence any such care in balancing these interests against the interest of the community and that of the individual in freedom of discussion on matters of public concern." (Emphasis ours.)

Directly pertinent is the statement in the **Thornhill** case that "we hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in section 3448."

We fail to see how the classification of strikes into "authorized" and "unauthorized" can be validly squared with the above pronouncements.

THE WISCONSIN COURT'S USE OF THE TERM "COERCION" IS INEXACT AND INACCURATE. THE UNITED STATES SUPREME COURT HAS DECLARED IDENTICAL CONDUCT TO CONSTITUTE THE EXERCISE OF FREE SPEECH.

In numerous places throughout the decision the state court uses the term "coercion." When such term is used in connection with acts of violence disturbances and breaches of the peace there can be no dispute with such use. When, however, the term is used in connection with otherwise peaceful activities then that court has fallen into the error of being guided by distasteful terms rather than by reality.

In its decision the Court points out that a minority group may withdraw from employment, either singly or in concert, without running afoul of the law, but "if they attempt to **coerce** their employer by concerted picketing, a boycott, or by any other similar overt concomitant of a strike, they will be found guilty of an unfair labor practice as defined in the act." (Emphasis ours.)

We gather from the use of the term "coerce" in the above respect that the Wisconsin court classified picketing, boycotting, or any other similar overt concomitant of a strike as being coercive per se. Either that, or the Court has said that such action by a minority group constitutes coercion, while such action when "licensed" or "authorized" by a majority group does not constitute coercion. We reject the latter interpretation, since in the opinion the Court speaks of the employees' "right to coerce," and further states that "the act limits the use of coercive measures." From this we must assume that the Court considers all of such actions coercive.

It would seem that the state court subscribes to the philosophy that peaceful persuasion and statement of truths is coercive in that its tendency may be to prohibit

the continuance of those actions which prompt the persuasion.

Even if we are to assume that the Wisconsin court is correct when it labels peaceful activities with the opprobrious epithet of "coercion," such labeling cannot, nevertheless, permit restraint of such actions if such actions are assured by the Constitution of the United States.

The **Thornhill** and **Carlson** cases, together with the **Schneider** and **Hague** cases, have so conclusively identified the normal peaceful activities of labor organizations with the right of free speech that the Wisconsin Court cannot in any way distinguish such decisions in a fair and proper manner.

In the **Thornhill** and **Carlson** cases specifically the actions therein identified as being synonymous with free speech were the **concerted activities** of members of labor organizations, directed toward the legitimate objectives for which such labor organizations were formed. The conduct complained of constituted picketing, patrolling, and advertising. The conduct condemned by the statute in those cases was picketing, patrolling, and advertising. The decisions of the United States Supreme Court in those cases are so clear that it comes with unbelievable shock that the Wisconsin Court should seek to distinguish such cases by calling in this case "coercion" what is called in those cases "free speech."

Apparently the entire decision of the Court rested upon the fallacious concept that those activities enumerated in section 103.53 of the Wisconsin statutes (the State Norris-La Guardia Act) are coercive in nature, and, therefore, subject to complete restraint by the Legislature unless under certain circumstances the Legislature sees fit to permit such coercive conduct. The acts which are enumerated in section 103.53 of the statutes are not privileges granted

by the Legislature. **Senn v. Tile Layers' Union**, 301 U. S. 468. They constitute the exercise of the right of free speech as set forth and defined in the **Senn, Thornhill** and **Carlson** cases.

As was specficially stated by Justice Brandeis in the **Senn** case:

> "Members of a union might, **without special statutory authorization by a state**, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." (Emphasis ours.)

Sections 103.53 (1) (e) (g) (h) (j) and (l), for instance, are exactly the type of acts which are referred to and discussed in the **Thornhill** and **Carlson** cases. **The Wisconsin Legislature itself recognized that the acts enumerated in such sections are not in and of themselves coercive, since it set forth in connection with those acts the caveat that such acts be not accompanied by intimidation or coercion** [Section 103.53 (1) (e)].

Under the state court's misapprehension that peaceful activities of labor organizations are coercive, so must every other utterance in an election campaign, in the legislative chamber, and before this very court, be deemed coercive. Every defense of rights, every criticism of wrongs, every expression of opinion, every exhortation, every endeavor to gain by peaceful means the co-operation and support of fellow citizens is coercive and subject to restraint under the characterization of the Wisconsin court.

The Fallacy in the Court's "Majority Rule" Argument.

The argument of the state court with respect to the majority rule completely discloses the failure of that court to distinguish between the majority rule when used

for the designation or election of representatives, and the majority rule when used **to prohibit the exercise of the right of free speech.**

The majority of the people of the United States on November 5, 1940, designated Franklin D. Roosevelt as President of the United States. A minority, numbering over 20,000,000, had desired Mr. Wendell Willkie as its representative. Although the election resulted adversely to the wishes and desires of these 20,000,000, these 20,000,000 and their candidate remain free to express their dissatisfaction with the results and to criticize the practices and policies of the elected administration for the next four years.

We know of no court in this country that has ever held the constitutonal guarantees lost to citizens of a state by virtue of the fact that they comprise a minority. We believe section 111.06 (2) (e), the order based thereon, and the decision of the Wisconsin court affirming such order, are every bit as reprehensible as would be a law which provides that all those who voted for Wendell Willkie are forbidden for the next four years from continuing their allegiance to him by speech, by placard, by pamphlet, or by any other device through which freedom of speech is exercised.

The distinction between the election of a representative by a majority and the right of the minority, although bound by the results of the election, to continue the exercise of their constitutional guarantees, is the very basis of our democracy. Were it otherwise there could be only one election in any democracy. It would be manifestly impossible and absurd to have any other elections, other than the first one, if after the first one the right to protest, the right to discuss, the right to exhort, and the right to persuade others to come to their cause, is forbidden to the minority.

When the Wisconsin Court says in effect that if a majority of the employees are willing to continue under intolerable working conditions, oppressive wages, or killing hours, that is their own misfortune, and that has been brought on by their own docility, it certainly provides no balm to those who refuse to be bound by such docility. Certainly in this country an individual or group of individuals must still have the right to protect and to seek support in their crusade, even though others are not aroused. Certainly in this country we have not reached the point where the crusader is deprived of his armor and sword, never to crusade again, solely because a majority are not convinced of the merits of the crusade.

Yet the Wisconsin Court says that labor is not to be alarmed because of the oppressive legislation, and says:

> "* * * No group within the body politic has shown itself more willing to stand upon its rights and sacrifice present advantage for future benefits than has labor."

Labor has fought persistently for its self-betterment. But such commendation means nothing when it is embodied in a decision which takes away from labor the only effective way it has of carrying on its purposes. What device is left to labor? What means can it adopt? How can it protect itself if its rights to appeal to the public, to persuade fellow employees, and to advertise the facts and circumstances of a labor controversy, are taken from it? What device can it use in its defense? What does the Wisconsin Court give to labor in its crusade for better hours, wages, and working conditions when it tells labor it may not picket, it may not advertise, it may not boycott, it may not express its opinions and its views, and it may not exercise the rights guaranteed by the Constitution of the United States because a majority of the em-

ployees working for a particular employer has not licensed, authorized, or permitted them to do so?

There are many who, if informed of the circumstances surrounding the employment relationship of the Plankinton and Kilbourn Hotels, will not patronize such hotels. There are many people who do not patronize an employer if aware that only an employee considers himself abused. There are hundreds of thousands of people who would not patronize any employer, even though all employees are apparently satisfied, if such employer's labor policy is such that competing employers cannot successfully compete unless they too engage in oppressive labor practices.

Under the decision of the Wisconsin Court, how are these people to know whether their hard-earned money is being used to support those who are not deserving of such support? Under the decision of the Court, how are fellow union members—fellow members in all affiliated organizations—to know that the Plankinton and Kilbourn Hotels have no labor agreement with the appellant unions, and, therefore, are not entitled to their patronage and their custom?

It is very well for the Wisconsin Court to state that none should have fear that labor will be servile, docile, or moribund, but if that fear did not exist before the rendition of this opinion it certainly must exist now under the decision of the Court. What other alternative does the state court grant to a minority group which is prohibited the right of freely expressing its opinion, and prohibited the right of peacefully conveying the truth of its difficulties to the public?

The United States Supreme Court in the **Thornhill** case supplies a complete answer to the argument of this Court that the rule of the majority must govern:

"But the group in power at any moment may not

impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests."

VI.

MEMORANDUM OPINION ON THE MOTION FOR REHEARING.

On the motion for rehearing the Court rendered another opinion (Supp. R. 69-7.). In that opinion the Court seeks to disregard all of the previous utterances in the original opinion, and indicates that its decision is based upon the purported acts of violence, and that section 111.06 (2) (e), regardless of its plain and obvious terms, is directed only to acts of violence. The opinion on the motion for rehearing, therefore, served only to further confuse what was already a confused and indefensible opinion.

It is now argued by the respondents that what the Wisconsin court did on the motion for rehearing was to anticipate the holding of the United States Supreme Court in the **Meadowmoor** case. We have already pointed out that the record will not support such holding.

Furthermore, it must be apparent from the reading of the decisions of the Wisconsin Supreme Court (and we refer also to its subsequent decisions in the cases of **Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers and Dairy Employees' Union, Local 225 etc.**, 299 N. W. 31, and **Carpenter Baking Company v. Bakery Sales Drivers Local Union No. 344 et al.**, 299 N. W. 30, and 300 N. W. 235 [decision on motion for rehearing], set forth in the appendix to our reply brief on the petition for certiorari) that organized labor and working men in the State of Wisconsin had been deprived of those rights assured to them under the Fourteenth Amendment to the Consti-

tution of the United States by the arbitrary device employed by the Wisconsin Legislature and upheld by the Wisconsin court.

Additionally, the subsequent decisions of the Wisconsin Supreme Court afore referred to, particularly the **Carpenter Baking Company** case, demonstrate clearly that it is the first opinion of the Wisconsin Supreme Court in the instant case, which has become the controlling law in the state, since in the **Carpenter Baking Company** case there was absolutely no violence of any kind, yet the Court sustained an injunction which prohibited all peaceful activities which were designed to persuade persons not to deal with the employer, with the employer's products or with retail dealers which offered the employer's products for sale. On the motion for rehearing in the **Carpenter Baking Company** case, the Wisconsin court sought to place its decision on a question of fact rather than on a question of law, despite the stipulated fact that there was no violence.

It is, therefore, obvious that only a clear unequivocal statement from this Court will serve to preserve the constitutional rights of working men in the State of Wisconsin.

CONCLUSION.

The single issue involved in this case is whether or not the State of Wisconsin, either through its Legislature, its administrative boards, or its courts, may deny to these petitioners and all others similarly situated those rights assured to them by the Fourteenth Amendment to the Constitution of the United States, which include the right to peacefully picket, boycott, and engage in the usual overt concomitants of a strike. There is no issue in this case of whether or not the State of Wisconsin has the

right to prohibit violence or disorder, nor is there any issue in this case concerning any purported legality of objective sought to be obtained by a labor organization.

The previous decisions of this Court, as cited in our brief, should have made appeal to this Court unnecessary. In view of the complete and utter disregard of those decisions, however, the Wisconsin Court has denied to these petitioners the constitutional rights afore referred to.

It is, therefore, respectfully submitted that the decision of the Court upholding and affirming the Board's order and upholding the validity of the provisions of the so-called Employment Peace Act discussed in this brief as being constitutional legislative enactments is erroneous and should be reversed.

Respectfully submitted,

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Attorneys for Petitioners.

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM — 1941.

No. 124

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL No. 122; PHIL L. VALLEY, JOHN ALEXANDER, and JACK HEISDORF, each individually, as business agent, organizer and vice-president, respectively, for and as representatives of all the members of Hotel & Restaurant Employees' International Alliance, Local No. 122;
INTERNATIONAL LAUNDRY WORKERS, LOCAL No. 174;
BARTENDERS INTERNATIONAL LEAGUE OF AMERICA, LOCAL No. 64, sometimes known as International Bartenders & Beverage Dispensers, Local No. 64;
INTERNATIONAL UNION OPERATING ENGINEERS, LOCAL No. 311;
MILWAUKEE BUILDING TRADES COUNCIL;
All affiliated with the American Federation of Labor,
Petitioners and Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD; HENRY C. FULDNER, individually and as Chairman of, L. E. GOODING, individually and as a member of, R. FLOYD GREEN, individually and as a member of the Wisconsin Employment Relations Board;
PLANKINTON HOUSE COMPANY, a corporation,
Respondents and Appellees.

BRIEF OF PLANKINTON HOUSE COMPANY, Respondent, In Opposition to Petition for Writ of Certiorari.

HERMAN M. KNOELLER
Attorney for
Plankinton House Company,
Respondent.

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM — 1941.

No. 124

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL No. 122, et al.,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, PLANKINTON HOUSE COMPANY, et al.,

Respondents.

BRIEF OF PLANKINTON HOUSE COMPANY, Respondent,

In Opposition to Petition for Writ of Certiorari.

NATURE OF ACTION

This is a proceeding before the above entitled court upon a petition of the above named trade unions and certain individuals acting personally and in a representative capacity as the officers and members of the aforesaid unions for a Writ of Certiorari to review a decision of the Supreme Court of Wisconsin (236 Wis. 329; 294 N. W. 632) rendered November 8, 1940, and after motion for rehearing was denied January 7, 1941 (236 Wis. 329; 295 N. W. 634). Said

State Supreme Court's decision affirmed the judgment of the Circuit Court of Milwaukee County, Wisconsin, rendered May 14, 1940, sustaining, confirming and enforcing an order made by the Wisconsin Employment Relations Board on February 15, 1940. Based upon the complaint filed November 20, 1939, by the Plankinton House Company (hereinafter called "the employer") charging the petitioners herein (hereinafter called "the unions involved") with violence, mass picketing and other unfair labor practices under the Wisconsin Employment Peace Act (Ch. 111 Wis. Stats. 1939), a full hearing commencing on December 1, 1939, was had before the Wisconsin Employment Relations Board (hereinafter called "the Board") which filed its Findings of Fact and Conclusions of Law determining the petitioners herein guilty of violence and other unfair labor practices. The Board issued its order directing that the petitioners herein take certain affirmative action by way of posting notices, etc. in order to effectuate the policy of the Act and that they immediately cease and desist from:

(a) Engaging in, promoting or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;

(b) Attempting to hinder or prevent by threats, intimidation, force, or coercion of any kind, the pursuit of lawful work by employees of the Plankinton House Company;

(c) Boycotting in any way the Plankinton House Company.

STATEMENT OF JURISDICTIONAL GROUNDS

The case is brought to this court on the ground that it involves a justiciable controversy under Sec. 237 (b) of the Act of Congress dated February 13, 1925 (28 U.S.C.A. 344 (b)) providing, inter alia, that this court has jurisdiction to review by certiorari the final judgment of the highest

court of any state determining the validity of a state statute allegedly repugnant to any provision of the United States Constitution. The position of the respondent, the Plankinton House Company, in this respect is:

(1) That there is no substantial federal question involved;

(2) The assumed federal question is frivolous and devoid of merit because it rests on obviously false assumptions not appearing in the record, namely, merely peaceful picketing and "peaceful persuasion disentangled from violence and free from picketing en masse or otherwise conducted so as to occasion imminent and aggravating danger" (*American Federation of Labor v. Swing*, 312 U. S. ...., 61 Sup. Ct. 568; *Thornhill v. Alabama*, 310 U. S. 88; *Carlson v. California*, 310 U. S. 106);

(3) The assumed federal question is further frivolous and devoid of merit because it is contrary to the established law settled by this court in the case of *Milk Wagon Drivers Union of Chicago, Local 753, et al., v. Meadowmoor Dairies, Inc.*, (1941) 312 U. S. ...., 61 Sup. Ct. 552, 85 L. Ed. (Adv. Op.) 497);

(4) Even if a federal question does exist there is also in the record an alternative independent non-federal question decided by the Wisconsin Supreme Court which is in itself broad enough to sustain the State Court's judgment and warrant the denial of a Writ of Certiorari.

CORRECTED STATEMENT OF FACTS

In limine, we wish to challenge the accuracy of the "Summary of Matter Involved" set forth in the Petition for Writ of Certiorari (p. 2-6) and incorporated by refer-

ence in the Unions' brief. Errors of omission and commission exist especially in respect to the Unions' acts of past violence and other unfair labor practices and the continuing fear and intimidation resulting therefrom. For the sake of brevity and to avoid repetition we do not here enumerate the errors but give them special treatment in this brief under the heading of "ARGUMENT," which immediately follows.

ARGUMENT

Summary of Argument

I—The true record is replete with acts of violence and continuing manifestations of force, fear and unfair advertising on the part of the petitioners.

II—There is no substantial federal question involved.

III—The Wisconsin Employment Peace Act and especially Sec. 111.06 (2) (e) thereof is a valid exercise of the State's police powers.

I.

The True Record Is Replete With Acts of Violence and Continuing Manifestations of Force, Fear and Unfair Advertising On the Part of the Petitioners.

A. The Real Purpose of the Wisconsin Employment Peace Act.

The purpose of the Wisconsin Employment Peace Act was not as stated on p. 2 of the Petition. The purpose of the Act and the public policy of the State in respect thereto is plainly and unmistakably set forth in Sec. 111.01 of the Act.

It is therein stated that there are three major interests involved in every strike, namely, the public, the employee and the employer; that industrial peace, regular and adequate income for the employe and uninterrupted production of goods and services are promotive of all these interests which are dependent upon peaceful adjustment of whatever controversy may arise; that the primary rights of third parties should not be invaded; that negotiations of terms and conditions of work should result from voluntary agreement between employer and employees; that standards of fair conduct in employment relations should be established, thereby limiting individuals and group rights of aggression and defense in respect to which the State substitutes processes of justice for the more primitive methods of trial by combat.

Other distinguishing features of the Act are:

(1) It is neither penal nor criminal in its nature and provides for neither fines nor imprisonment for the commission of unfair labor practices enumerated therein (Sec. 111.07 (4) Wis. Stats.).

(2) It makes no provision by way of reparation or restitution to the employer or employee for the civil wrongs suffered by the commission of unfair labor practices but relegates the parties to their remedies at law and equity to be obtained in a separate civil proceedings (Sec. 111.07 (1) Wis. Stats.).

(3) It not only recognizes the right of employees to organize (Sec. 111.04 Wis. Stats.) but forbids interference therewith (Sec. 111.06 (1) Wis. Stats.).

(4) It cautiously provides that nothing therein shall be construed so as to invade unlawfully the right to free

speech, or to interfere with or impede or diminish in any way the right to strike or the right of individuals to work (Sec. 111.15 Wis. Stats.).

The purpose of the Act was not to repudiate or pervert the basic principles of the National Labor Relations Act and the 1937 Wisconsin Labor Relations Act or to destroy the equalization of employer-employee bargaining power as alleged on p. 2 of the Petition. As stated by the Wisconsin Supreme Court in its opinion (Sup. R. 62 and 63), the purpose of the Act was to prevent the commission of unfair labor practices not only by employers but also by employees and thereby attain industrial peace, regular and adequate income for employees and the uninterrupted production of goods and services.

B. The Real Record of Violent Means Adopted.

The inability of the parties to agree upon proposed changes in a new labor contract was not as stated on p. 3 of the Petition but was the result of the Unions' arbitrary action in canceling negotiation proceedings, demanding arbitration as provided by the labor contract and then refusing to abide by the arbitration award and repudiating its labor contract by calling a strike, indulging in violence and mass picketing and disseminating under the guise of freedom of speech, false publicity and untruthful advertising that the employer was unfair to organized labor, as disclosed by Findings of Fact Numbered 10 to 27, inclusive, and Conclusions of Law Numbered 1 to 4, inclusive, of the Board (R. 254-260) which were in all respects sustained by the Milwaukee Circuit Court (R. 47-50) and confirmed by the Wisconsin Supreme Court in its original opinion (Sup. R.

50, 57, 58, 63), and in its final opinion denying the motion for rehearing (Sup. R. 70, 71).

The acts of violence and other unfair labor practices of the petitioner were not merely a few simple assaults or fugitive encounters as alleged on p. 4 of the Petition, but were studied and concerted manifestations of force, fear, violence and unfair advertising committed by high ranking officers of the Union, picket captains and supervisors of the picket lines, not once but several times, and at a time (November 17, 1939) which was less than two weeks prior to the commencement of the hearing on December 1, 1939, before the Wisconsin Labor Relations Board. Contrary to the allegations contained on pp. 4 and 5 of the Petition, the employer's complaint before the Wisconsin Employment Relations Board charged and the record proved, without contradiction, that in violation of Sec. 111.06 (2) (a) and Sec. 111.06 (2) (f) Wis. Stats. prohibiting coercion and intimidation of an employee in the enjoyment of his legal rights and the security in his person and property, and in violation of Sec. 111.06 (2) (j) Wis. Stats. prohibiting the commission of crimes, the unions, their officers and their members committed the following unlawful acts upon the following persons:

(1) Paul Ziebell, an employed bellboy, was on November 7, 1939, assaulted and battered while standing in the hotel by James O'Brien, a union member and picket, who was carrying a picket sign and left the picket line and entered the hotel to strike Mr. Ziebell in the face with his clenched fists and commit the crime and misdemeanor (R. 132-138, S. R. 19, 20).

(2) Lester Raasch, an employed bellboy, on November 5, 1939, was threatened by the same James O'Brien with physical violence (R. 135-138) and on November 6, 1939, while holding the hotel

doors open for guests, was spit upon by the same James O'Brien while performing picket duty (R. 136) and on November 17, 1939, while unloading an automobile of a guest of the hotel, was struck three or four blows in the face with the clenched fist of Charles McLaughlin, assistant business agent and assistant secretary of Hotel Employees' Union, Local 122, and supervisor of pickets (R. 136-138, 96, 97, 87, S. R. 19, 20).

(3) Harvey Weber, purchasing agent, was on November 4, 1939, assaulted, battered, and threatened by Phil L. Valley, business manager of Local No. 122 (R. 138-140) and on November 13, 1939, was abused and intimidated by the above mentioned Charles McLaughlin (R. 140, S. R. 19, 20).

(4) James Myrick, an employed busboy, was on November 5, 1939, threatened and called vile names by the above mentioned Charles McLaughlin (R. 141, 142) and on November 6, 1939, was spit in the face by James O'Brien who was performing picket duty at the hotel (R. 141, 142, S. R. 19, 20).

(5) Thomas James, an employed laundry man, on November 17, 1939, while leaving the hotel for the hospital to see his sick wife, was attacked by Larry C. McAllen, a picket captain (placed there by the chairman of the union's picket committee) (R. 96-97) and was violently thrown to the sidewalk, rendered helpless when his arms were pinned under the picket's knees, and was struck several severe blows in the face with the clenched fists of the picket before rescued by the police. The injuries sustained were serious and necessitated X-rays and medical treatment (R. 143, 144, 97, S. R. 19, 20).

(6) Edward Knopf, an employed bellboy, was on November 14, 1939, kicked in the knees several times by Thomas O'Mahar, a picket and a former

employee of the Plankinton House, who left the picket line to assault Mr. Knopf on the public highway (R. 144, 145, S. R. 19, 20).

(7) Elmer Hundt, supervisor of the Plankinton House parking lot, was on November 9, 1939, called a vile and abusive name by the above mentioned Thomas O'Mahar who was performing picket duty and in the presence of the union supervisor who did not reprimand him (R. 146, 147, S. R. 19, 20).

(8) Fred Langdon, an employed crippled valet at the Plankinton House, was on November 11, 1939, slugged with the clenched fists of two men, purporting to act for the Union, at a tavern nearby (R. 148, 149).

(9) Rudolph Stano, an employed bellboy, on November 17, 1939, while loading a guest's car at the hotel, was struck several blows in the face by Joseph Hofich, captain of the pickets at the Plankinton House and who still supervises the picket line (R. 149, 150, 89, 90, 97, S. R. 19, 20).

(10) Ward Whitney, an employed busboy, was on November 18, 1939, assaulted and battered at the entrance of the Plankinton House by a picket who left the picket line and delivered four or five blows with his clenched fist and later that same day was again attacked in the public street by two persons purporting to act for the Union and again was struck several blows with the clenched fists of his assailants (R. 150-153).

(11) Robert Jeske, assistant purchasing agent, on November 10, 1939, was struck several severe blows in the face with the clenched fist of Charles Alden, a union picket and former doorman at the hotel, when Jeske sought to make a delivery of ice (R. 111, 112, S. R. 21).

(12) H. O. Wood, general manager of the Plankinton House, was spit upon by one of the pickets; some of the pickets carried sticks and clubs in their

hands as they paraded in front of the hotel entrances; they booed, hissed and sneered at hotel guests all day and night; during the course of their boisterous conduct parading in front of the hotel entrances they ate peanuts and constantly threw the shells or shucks thereof in the doorways of the hotel; on the arrival of a taxicab they yelled and hooted and directed the prospective guests to other hotels (R. 158, 162).

(13) William Komes, the head waiter at the Plankinton House, on November 4, 1939, while holding the delivery doors of the hotel open for a floral decoration delivery, was threatened and called vile names by pickets (R. 100-102).

(14) Peggy Hehmeyer, the head waitress at the Plankinton House, on November 4, 1939, while assisting Mr. Komes in holding the delivery door open was threatened with physical violence by fifteen or twenty pickets menacingly parading before her (R. 104).

(15) John W. Polcyn, Captain of the Milwaukee Police Department, testified to seven distinct arrests and convictions of the pickets at the property of the Plankinton House Company because of violence, crimes, and misdemeanors (R. 194-197, S. R. 32). As an expert in maintaining peace and order, he would not state that the instances of disorderly conduct or disturbances were small in view of the circumstances (R. 198).

The Board's findings numbered 20, 21, 23, 24, 25 (R. 258, 259), and amended 26 (R. 271) and amended Conclusion of Law numbered 4 (R. 271, 272) are in conformity with the record above cited.

Furthermore, the employer's complaint before the Wisconsin Employment Relations Board charged and the record discloses that in violation of Sec. 111.06 (2) (f), Wis. Stats., prohibiting the hindrance by mass picketing, threats, intim-

idation, force and coercion of the pursuit of lawful work and the obstruction of the entrance to and the egress from the place of employment and interference with the free and uninterrupted use of public roads and the deliveries of materials to and from the employer's business, and in violation of Sec. 111.06 (2) (h), Wis. Stats., prohibiting the taking of unauthorized possession of the employer's property, the Unions did commit the following acts on the dates hereinafter mentioned:

(1) On November 4, 1939, a delivery of floral decorations was prevented by the Unions who indulged in mass picketing and their Vice-President and assistant business agent, Jack Heisdorf, and their assistant business agent and Secretary, Charles McLaughlin, assaulted the delivery man and the pickets destroyed the floral decorations (R. 100-104, S. R. 19, 20).

(2) On November 5, 1939, a delivery of clean wash from the Plankinton House to the Kilbourn Hotel was prevented by a flying squadron of mass pickets who threatened violence and intimidated the employees (R. 138, 139).

(3) On November 4, 1939, a delivery of sample cases by guests of the hotel was prevented by mass picketing and by Phil L. Valley, union business manager, who threatened violence and assaulted and battered Harvey Weber, an employee (R. 139, 140).

(4) On November 13, 1939, a delivery of waste paper from the hotel to a dealer was prevented by the above named Charles McLaughlin and a large group of pickets who threatened violence to the truck driver and used vile and indecent terms toward Harvey Weber, an employee (R. 139, 140, 141-143, S. R. 19, 20).

(5) On November [illegible], 1939, an attempt to deliver ice cubes to the hotel was prevented by mass picket-

ing, assault, and battery of employees, and the cans of ice were tipped and the ice cubes dumped into the gutter of the street by the pickets and officers of the Unions (R. 104, 105, 111-113, 124-126).

(6) About two weeks before December 11, 1939, shingle nails were spread about the parking lots on several occasions on each day near where ten pickets were standing. The police officer himself assisted in picking up the same (R. 146, 147).

(7) On November 19, 1939, a liquid stench bomb was spread along thirty feet of the carpet on the third floor of the hotel near the dining rooms and near student classrooms of the Business Institute (R. 156, 157, 122).

(8) On November 26, 1939, the rear elevator landing window on the main floor of the Plankinton House was broken by a large stone (R. 157, Exhibits 22, 23).

(9) Ever since November 2, 1939, the pickets have gathered at the hotel at different times in large numbers, jeering and spitting upon the clothing of employees and guests of the hotel, booing, hissing and sneering at the guests and employees in a very boisterous manner, eating peanuts and throwing the shells in the hotel entrance doors. Some of the pickets carry sticks and clubs; in the evening when the guests are about to retire, the pickets yell and hoot at the arrival of every taxicab (R. 158).

Findings of Fact numbered 19 and 22 (R. 257, 258, S. R. 8-18) and amended Conclusion of Law numbered 4 (R. 271) of the Board are in conformity with the undisputed record above cited.

Furthermore, the complaint charged and the record also discloses that in violation of Sec. 111.06 (2) (g), Wis. Stats., the Unions engaged in a secondary boycott, to-wit:

(1) On or about November 8, 1939, the Unions intimidated and coerced Marquette University by threatening the discharge of several hundred college students from other hotels and restaurants in the City and County of Milwaukee unless the University forced the students working at the Plankinton House to cease work and go out on strike; it was a distinct threat and was to be carried out unless the University yielded (R. 114-119).

(2) On or about November 8, 1939, the Unions intimidated and coerced the Milwaukee School of Engineering by threatening the discharge of several hundred students then working at other hotels and union shops in the City and County of Milwaukee unless the Milwaukee School of Engineering forced their students working at the Plankinton House to cease work and go out on strike (R. 119-121, S. R. 21).

(3) On or about November 13, 1939, one of the attorneys for the Unions urged the Business Institute of Milwaukee, a tenant of the Plankinton House Company at the Plankinton House, to break its valid existing lease without cause or justification, and upon refusal, the employees and customers of the Business Institute were insulted, hissed and booed at by the pickets. A stench bomb was thereafter found on the third floor of the hotel near the classrooms of the Business Institute, as a result of which students were nauseated and forced to go home (R. 121-124).

The Board's Finding numbered 17 (R. 257) and amended Conclusion of Law numbered 4 (R. 271) are in conformity with the undisputed record and the testimony of the Unions' own witnesses corroborates the charge.

C. The Real Object of the Unlawful Concerted Activities.

An examination of the record also discloses that not only

the above unlawful means were adopted by the Unions, but that the unlawful object of the Unions' concerted action was to force the employer to commit unfair labor practices contrary to the declared public labor policy of the State of Wisconsin and in direct violation of the following positive legislative enactments of said State:

(1) Sec. 111.06 (1) (c) Wis. Stats., prohibiting the employer from entering into an all-union or closed shop agreement unless three-fourths or more of the employees shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the Board. The award of the arbitration board (Exhibit 9, R. 84) expressly provided for a compliance with this statute and the law would impute the provisions of this statute to every labor contract whether written therein or not (*Stone v. Interstate Exchange*, 200 Wis. 585, 589, 229 N. W. 26; *Baumann v. West Allis*, 187 Wis. 506, 525, 204 N. W. 907). In the case at bar no vote whatsoever was taken, much less a three-fourths vote by secret ballot under the direction of the Board as required by the above statute. The Unions emphatically refused to take a vote on this question (R. 226). Every demand made by the Unions to change the terms and conditions contained in the 1938 labor contract was granted by the arbitrators with but one exception and that was in respect to the all-union or closed shop issue. Despite all this, the employer accepted the arbitration award (Exhibit 10, R. 84). So the only dispute remaining between the parties was over the closed shop provision or all-union contract which the Unions sought to enforce upon the employer without the required statutory vote as found by the Board in its memorandum decision (R. 266) and proven by the admissions of the parties themselves (R. 168; R. 191). Thus, it was said there was only one issue, and that was "a clear cut dispute

on the issue of a closed shop under the terms of the arbitration award" (R. 205, S. R. 34).

(2) Sec. 111.06 (1) (e), Wis Stats., prohibiting an employer from bargaining collectively with the representative of less than a majority of his employees would also be violated by the employer if the Unions succeeded in their unlawful concerted action. As a matter of law the employer could not recognize as the exclusive bargaining agency for all his employees the minority represented by the Unions herein; and if he refused to bargain collectively with the representative of a majority of his employees he would also violate Sec. 111.06 (1) (d) Wis. Stats. and be guilty of unfair labor practices. The overwhelming vote of the Plankinton House Company employees by secret ballot in the election held by the Wisconsin Employment Relations Board on February 29, 1940, distinctly showed that 130 out 134 employees voting favored their own independent union as their exclusive bargaining representative (S. R. 39, 40). Certainly the employer is bound by virtue of Sec. 111.06 (1) (f), Wis. Stats., to the terms of the collective bargaining agreement (Exhibit 31, S. R. 25) duly executed with the Independent Organization of the Plankinton House Company Employees which was duly certified by the Wisconsin Employment Relations Board on March 6, 1940 (S. R. 39, 40) as the exclusive representative for collective bargaining purposes.

The basis, therefore, for the issuance of the Labor Board's order was not merely the failure on the part of the Union to obtain a majority vote before going on strike as alleged on p. 5 of the Petition, but also embraced the violence and other unfair labor practices on the part of the Unions, their officers and their members who were sued in a representative capacity. The Findings of the Board numbered 15 to 27 (R. 256-259), together with the amended Finding numbered 26

(R. 271), refer to the action of the Unions and indicate that the individuals performed their unlawful acts as *officers and members of the Unions involved*. It is significant to note that the lawbreakers, Phil L. Valley, business manager, Jack Heisdorf, Vice-President, Charles McLaughlin, assistant Secretary, James O'Brien (a picket stationed by the Unions on the picket line), Joseph Hofich, captain of the pickets, and Larry McAllen, a union picket, were never employees of the Plankinton House Company, but, as the Findings indicate, acted throughout the strike *as officers and agents of the Unions*. The Board's Conclusion of Law numbered 4 (R. 260) and amended Conclusion of Law numbered 4 (R. 271, 272) specifically find the above named parties and others guilty of unfair labor practices "*arising out of the controversy between respondent unions and the complainant, Plankinton House Company.*" Also, the Order of the Board to cease and desist from attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employees of the Plankinton House Company is expressly directed against the *appellant Unions*, their officers, members, agents, successors, and assigns (R. 260, 261).

D. The Continuity of the Force, Fear and Intimidation.

The record further discloses the existence and the continuity of the fear and intimidation generated by the past acts of violence and other unfair labor practices of the Unions involved. This Court's attention is called to the affidavits of H. O. Wood, general manager of the Plankinton House and the Kilbourn Hotel, which affidavits are attached to the Attorney General's motion for appropriate temporary relief, a restraining order, and in opposition to a statutory

stay of enforcement of the Board's Final Order and the Circuit Court's Decree (S. R. 6-18). The affidavits clearly show that the Unions still continue to indulge in unfair labor practices, picket the hotel entrances, intimidate employees and prospective hotel guests with abusive language, indulge in mass picketing, and interfere with deliveries at the hotels. The need for immediate preventive relief was not only apparent but imperative. The Board recognized this fact when it issued its Cease and Desist Order which was based upon its Findings of Fact numbered 27 which states: "Throughout the strike, the City of Milwaukee caused to be station at the Plankinton House throughout the twenty-four hours each day, six police officers for the purpose of maintaining order" (R. 259).

The Milwaukee Circuit Court on its review of the Findings of Fact, Conclusions of Law and the Order of the Labor Board recognized the background of violence that characterized the entire campaign of the Unions and the continuing fear and intimidation generated by those acts of violence and other unfair labor practices. Thus it stated in its decision (R. 20, 21):

> "The Board was justified in concluding that the violent methods, assaults or disturbances which were pursued or which ensued from the outset and from time to time thereafter, were ample to characterize the whole campaign or to warrant a reasonable inference that the attitude of the picketers was continuously threatening or that threatening conduct would be resorted to should conditions be favorable for the purpose. In this connection, constant presence of officers of the law and the nature of the conduct employed were sufficient to warrant the Board's Findings and Conclusions."

The trial court distinguished the *Thornhill* and *Carlson* cases upon the very fact that in the case at bar there existed

"violence, coercion, intimidation and threats" as found by the Board upon sufficient evidence (R. 44).

Likewise, the Wisconsin Supreme Court emphasized throughout its original opinion the violent conduct of the Unions (S. R. 50, 56 58, 63). In its second opinion denying the motion for rehearing, the Court squarely placed its decision upon the record of violence in the case (S. R. 70-71) and expressly stated (R. 71):

> "The appellant employees, unions and officers are not in a position in this case to raise any question respecting the right peacefully to picket or the right of free speech. The picketing carried on in this case was not peaceful * * *."

E. The Unions' Authorization and Ratification of Unlawful Conduct.

A question is raised in the Petition with respect to the responsibility of the Unions for the unfair labor practices charged in the complaint, proved in the record and found by the Board and the Courts. It is elementary that the affirmance of an act by an agent may be established by any conduct of the purported principal manifesting that he consents to be a party to the transaction or by conduct justifiable only if there is a ratification, and that the affirmance of an unauthorized transaction may be inferred from a failure to repudiate it (*Restatement of the Law on Agency*, Vol. 1, Sec. 93, 94, p. 230-238). No authority need be cited for the rule that a principal is liable for the acts of his agent done within the scope of his authority and with an eye for his master's business. Sec. 103.54 Wis. Stats., expressly provides that an officer or member of an association and the association participating or interested in a labor dispute may be held

responsible or liable in any civil action at law or suit in equity or in any criminal prosecution for the unlawful acts of individual officers, members, or agents upon proof of a preponderance of the evidence of:

(1) The doing of such acts by persons who are officers, members, or agents of any such association, and

(2) Actual participation in or actual authorization of such acts or ratification of such acts after actual knowledge thereof by such association.

In the case at bar authorization and ratification were proved by the testimony of the Union Officers themselves, to-wit:

(1) Alfonso Gamby, President of Local 122 and Chairman of the Executive Committee, testified that John Alexander kept a daily record of the men who were placed on the picket line and was appointed captain of the strike committee by Phil. L. Valley, business agent, with the Executive Board's approval; that when men were placed on the picket line they were given cards and later paid off for picket duty; James O'Brien was so paid off for picket duty (R. 218).

(2) Phil L. Valley, business agent, has supervisory control over the Union officers in their territory and sees to it that they keep their territory "clean"; he was authorized to call the strike and had full power to appoint a captain to handle the pickets (R. 83); he called the strike (R. 84) and ordered 75 to 80 men to form a picket line about the hotel (R. 85). He was present at the time the florist truck pulled up to make a delivery of floral decorations to the Plankinton House on November 4, 1939, when John Heisdorf (Union Vice-President) and Charles A. McLaughlin (Assistant Business Agent and Secretary of the Union)

assaulted and battered the delivery man; he knew of the arrest of John Heisdorf and Charles McLaughlin therefor. The Unions provided bail and legal counsel; a day or two thereafter Mr. Heisdorf was returned to the picket line (R. 85-87). The Unions also provided bail and legal counsel and paid the criminal fine for Mr. McLaughlin by reason of his arrest and subsequent conviction. Immediately thereafter the Unions returned Mr. McLaughlin to the picket line. He was again arrested for extreme violence on November 17, 1939, and again his bail and legal counsel were provided by the Unions; and upon conviction, his fine paid by the Unions (R. 87). Mr. Valley knew about Mr. James O'Brien, a former Union member and prize fighter, who was arrested for assault and battery on the picket lines at the Plankinton House on November 17, 1939 (R. 88). Mr. Valley knew about Thomas J. O'Mahar, a member of the Union doing picket duty, who was arrested and convicted on November 14, 1939, for striking and kicking Edward Knopf, a bellboy at the Plankinton House. The Union again provided bail and legal counsel for Mr. O'Mahar and paid his fine and returned him to the picket lines where he still is (R. 89). Joseph Hofich is known to Mr. Valley as a member of the Union and captain of the pickets at the Plankinton House. Mr. Hofich was arrested by the police on November 19, 1939, for striking Rudolph Stano, an employed bellboy, several blows in the face with his clenched fist; Mr. Valley received the report on this assault and battery and the Union provided bail and legal counsel for Mr. Hofich (R. 89, 90). Later Mr. Hofich was found guilty and fined for this offense (R. 196). Thereafter, Mr. Hofich was returned to the picket line *as supervisor of pickets* (R. 97).

(3) John Alexander testified that he was Chairman of the strike committee, had complete charge of all the pickets,

instructed them how to behave, and appointed picket captains. He placed Charles A. McLaughlin and John Heisdorf on the picket line. He instructed Thomas O'Mahar and Larry McAllen how to act on the picket line. He appointed Joseph Hofich captain of the pickets. After checking the record of James O'Brien with the Union records and his performance in the picket line, he paid Mr. O'Brien for performing picket duty (R. 95-99, S. R. 19, 20). The record discloses that James O'Brien as a picket not only assaulted and battered Paul Ziebell, an employed bellboy, on November 7, 1939 (R. 132-138, S. R. 19, 20), but on November 5, 1939, threatened Lester Raasch, an employed bellboy, with physical violence (R. 135-138) and on November 6, 1939, spit upon Lester Raasch while he was holding the hotel doors open for guests (R. 136).

All the individuals above mentioned, outside of Alfonso Gamby, John Alexander and Phil L. Valley (who was found guilty of unfair labor practices by the Board's Finding of Fact numbered 21 (R. 258)), were arrested and found guilty of acts of violence and breaches of the peace committed on the picket line. Some of them had been arrested several times and were still on the picket line performing official duties as supervisors, captains or pickets. Practically all of the parties found guilty of violence were not strangers who forced their way into the picket line but were and still are recognized as members of the Unions in good standing, retaining their supervisory power and high Union offices (R. 97). Some of them have been found guilty of not only one so-called isolated violation or fugitive encounter but several distinct offenses and nevertheless returned to the picket line after bail, legal counsel and even criminal fines were provided by the Unions. In the face of that record, can anyone help but conclude that the Unions participated in the unlawful acts of their leading officers and members?

The untimely resolutions, if any, of the Union Executive Board (R. 218) later reprimanding these law violators are simply self-serving oral declarations—never reduced to writing for inspection and verification. Needless to say the effect of these so-called resolutions was never very stimulating but, in fact, was destroyed by the Unions' permitting the self-same lawbreakers to return to the picket line as supervisors and captains after their criminal convictions. The self-professed Union apostle of peace, John Alexander, despite his national experience in Union activities from New York to San Francisco, supervised the pickets in the conduct of a sitdown strike at the Milwaukee Athletic Club in 1937 (R. 227, 228, S. R. 35, 36). He was the former President and business manager of the C. I. O. Hotel Employees' Union which he admitted was controlled by Communists: "Out of twelve members of the Executive Board of the C. I. O., nine were members of the Communist Party and it was under Communists' domination" (R. 225, S. R. 35). It might well be said that the action and conduct of the Unions, their officers and members, speak more convincingly than their words of mouth. Neither the Court nor the injured third parties are bound by the Unions' mere declaration but may seek and find the true purpose of their concerted action (Schultz v. Frankfort, etc., Ins. Co., 151 Wis. 537, 546, 139 N. W. 386). As stated by this Court in a labor controversy in *American Steel Foundries v. Tri-City Central Trades Council, et al.* (1921), 257 U. S. 184, 42 Sup. Ct. 72, 66 L. Ed. 189:

> "When one or more assaults or disturbances ensue they characterize the whole campaign which became effective because of its intimidating character in spite of the admonitions given by the leaders to their followers as to lawful methods to be pursued, however sincere."

The observation of Mr. Justice Frankfurter in the recent case of *Milk Wagon Drivers Union, et al. v. Meadowmoor*

Dairies, Inc., 312 U. S. ....., 61 Sup. Ct. 552 at 536, is very pertinent, to-wit:

> "It is true of a union as of an employer that it may be responsible for acts which it has not expressly authorized or which might not be attributable to it on strict application of the rules of respondeat superior."

F. The Real Issues of the Labor Dispute.

It is suggested in footnote numbered 1 on p. 6 of the Petition that the right of the Unions, the individual workers or even strangers to picket peacefully was denied in the case at bar because of the absence of an employer-employee relationship or a labor dispute as defined by Sec. 111.02 (8) Wis. Stats. This is not the fact; there never was a question of "stranger picketing" or the necessity of an employer-employee relationship before peaceful picketing may be conducted as decided by this court in the case of *A. F. of L. v. Swing*, 312 U. S. ....., 61 Sup. Ct. 568. The only issue in the case, prior to calling the strike, was, as heretofore stated, the right of the Unions to a closed shop without first obtaining a three-fourths vote by secret ballot as required by the statute (Sec. 111.06 (1) (c) Wis. Stats. (R. 84) and the award of the Arbitration Board (Exhibit 9, R. 266). After the strike was called the real issue was the right of the State of Wisconsin in the exercise of her sovereign powers over all manifestations of force within her borders, to regulate *concerted* picketing and *concerted* boycotting by powerful labor combinations found guilty of violence, intimidation and other unfair labor practices, including (Sec. 111.06 (2) (e)), Wis. Stats., the failure to obtain a majority vote of the workers by a secret ballot before engaging in the above overt concomitants of a general strike.

The assumption by the petitioners on p. 19 of their Petition and throughout their Brief, that they are the representatives of the minority of the employees in the exercise of their right to picket peacefully, has no basis in the record. The petitioners do not belong to that class. Prior to the calling of the strike they did not even take a statutory vote to determine the wishes of either the majority or the minority of the workers (R. 82). How then, can they claim to represent or champion the cause of the minority? The overwhelming vote of the Plankinton House Company employees by secret ballot in the election held under the supervision of the Wisconsin Employment Relations Board on February 29, 1940, distinctly showed that 130 out of 134 employees voting favored their own independent union as their exclusive bargaining representative (S. R. 39-40). The independent organization of the Plankinton House Company employees was duly certified by the Board on March 6, 1940, as the exclusive representative for collective bargaining purposes (S. R. 39-40) and now has a valid labor contract with the employer. Therefore, the Unions involved cannot claim to represent the majority. Whom do they represent? Is the basic tenet of all labor legislation — the right of the working man to determine by his own free will whether he will join or not join a particular labor organization — to be preserved? May a powerful combination of labor by concerted coercive activities, including realistic picketing enmeshed with extreme violence and destructive boycott directed at a business force the employer, in order to escape financial ruin, to interfere with his employees in the exercise of their free choice of self-organization by coercing them to join the union against their wishes? Shall the employees' legal right of self-organization succumb to the Unions' practical economic power to rule or ruin both the employer and his employees? The answer to

the above questions are self-evident in a government granting equal justice to all under the law and seeking national unity and security through industrial peace.

In conclusion, therefore, it may well be said the petitioners herein are inaccurate in their statement of facts and the issues involved. They have ignored the true facts and the real issues in the case and have substituted therefor foreign facts, feigned issues and false assumptions dehors the record. Upon the undisputed evidence it cannot be said that the Unions engaged in mere peaceful picketing as defined in the *Thornhill* and *Carlson* cases. They were not concerned with publicizing the true facts of the labor dispute, for, if they were, they would be forced to state that they destroyed industrial peace in Milwaukee by cancelling negotiation proceedings, demanding arbitration and then rejecting the arbitrartors' award, and calling a strike for the purpose of forcing the employer to:

(1) Grant them a closed shop contrary to law (Sec. 111.06 (1) (c) Wis. Stats. and without taking any vote therefor.

(2) Bargain collectively with the representative of less than a majority of his employees contrary to law (Sec. 111.06 (1) (e) Wis. Stats.) when another had been duly certified by the Board as the exclusive representative of his employees and had a valid collective bargaining contract with the employer.

(3) Interfere with and coerce his employees in their legal rights including the right to self-organization and to join or not join any union contrary to law (Sec. 111.06 (1) (a), Sec. 111.04 Wis. Stats.) so as to give the petitioners exclusive collective bargaining rights and a closed shop.

The Unions were not content with free competition and true communication of thoughts in the open market of ideas.

They were not satisfied with an appeal to reason in order to inform and persuade the public and the working employees to lend their support to Labor. (Cf. *A. F. of L. v. Swing*, 312 U. S. ...., 61 Sup. Ct. 568). On the contrary, they sought to coerce by resorting to concerted acts of extreme violence and realistic picketing enmeshed with a destructive primary and secondary boycott resulting in continuing fear and intimidation of the suppliers of merchandise, the working employees and the business customers of the Plankinton House Company. Under these circumstances the language of this Honorable Court in the *Meadowmoor case*, (312 U. S. ...., 61 Sup. Ct. 552 at 555), is strikingly pertinent to the facts in the case at bar, to-wit:

> "The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. So the Supreme Court of Illinois found. We cannot say that such a finding so contradicted experience as to warrant our rejection. Nor can we say that it was written into the Fourteenth Amendment that a state through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct.
>
> "These acts of violence are neither episodic nor isolated. Judges need not be so innocent of the actualities of such an industrial conflict as this record discloses as to find in the Constitution a denial of the right of Illinois to conclude that the use of force on such a scale was not the conduct of a few irresponsible outsiders. The Fourteenth Amendment still leaves the state ample discretion in dealing with manifestations of force in the settlement of industrial conflicts."

II.

There Is No Substantial Federal Question Involved.

In view of the explicit language contained in the final opinion of the State Supreme Court denying the motion for

rehearing and confirming the order of the Board and the judgment of the Milwaukee Circuit Court enjoining all picketing and boycotting because of the past violence and continuing fear and intimidation, there is really no necessity, as the State Supreme Court said (S. R. 71), "to distinguish between what a majority group may do in carrying on a strike from what the minority group may do." The Court further stated (S. R. 71):

> "We pointed out that the statute nowhere prohibited employees from withdrawing from their employment either singly or in groups and certainly it in no way interferes with the right of free speech. Sec. 111.06 (2) (e) as construed does not prohibit, as described in the *Thornhill case*, peaceful picketing. * * *"
>
> "The appellant employees, unions and officers are not in a position in this case to raise any question respecting the right peacefully to picket or the right of free speech. The picketing carried on in this case was not peaceful and the right of free speech is in no way infringed by the statute or the order of the Board."

The State Supreme Court had previously stated in its original opinion (S. R. 63):

> "The acts committed by the petitioners as shown by the findings in this case would have justified injunctive relief under the common law or any labor relations statute, either state or federal."

By reason of the aforesaid Findings of Fact and Conclusions of Law this Honorable Court may in its sound discretion and without proceeding further refuse to consider the constitutionality of the Wisconsin Employment Peace Act and especially Sec. 111.06 (2) (e) thereof on the ground that it is unnecessary for a decision on the merits of the case (Cf. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U. S. 430, 60 Sup. Ct. 670).

There is, therefore, no substantial federal question involved warranting the issuance of a Writ of Certiorari because:

(1) The federal reviewable character of a decision of the highest State court and what is drawn in question and decided is ascertained from its last and final judgment or opinion — not from any dictum or what was contained in its first or earlier opinion (*Grayson v. Harris*, 267 U. S. 352, *Burbank v. Ernst*, 232 U. S. 162); the Writ of Certiorari must be dismissed where the State court decision rested on non-federal grounds, notwithstanding the unnecessary discussion of any constitutional question (*Richardson Company v. Scott*, 276 U. S. 128).

(2) It is a settled rule that where the record shows, although there is a federal question in the case, there is also an alternative independent non-federal question decided by the State court which is in itself broad enough to sustain the judgment, the State court decision is not reviewable. (*Consolidated Turnpike Co. v. Norfolk etc., R. Co.*, 228 U. S. 596; *New York ex rel. Doyle v. Atwell*, 261 U. S. 390; *United States v. Hastings*, 296 U. S. 188; *Fox Film Corporation v. Muller*, 296 U. S. 207).

(3) The Findings of Fact of a State court in respect to violence and continuing intimidation in a labor dispute are conclusive in the federal court. As stated by this Court in the *Meadowmoor Case*, (312 U. S. ...., 61 Sup. Ct. 552 at 555 and 557):

> "It is not for us to make an independent valuation of the testimony before the master. We have not only his findings but his findings authenticated by the state of Illinois speaking through her supreme court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the

constitutional guarantee here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the state court is to transcend the limits of our authority. And to do so in the name of the Fourteenth Amendment in a matter peculiarly touching the local policy of a state regarding violence tends to discredit the great immunities of the Bill of Rights. * * * Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted. * * * Since the Union did not urge that the coercive effect had disappeared either before us or, apparently, before the state court, that question is not now here."

(4) The judgment of the highest State court is conclusive as to the construction and application of a state labor statute (*Senn v. Tile Layers Protective Union*, 301 U. S. 468; *Lauf, et al. v. E. G. Shinner & Co., Inc.*, 303 U. S. 323.) When an attack was made upon the constitutionality of a state statute as construed by the language of the Minnesota Supreme Court in *Minnesota v. Probate Court*, 309 U. S. 270 at 273, it was said:

> "This construction is binding upon us. Any contention that the construction is contrary to the terms of the Act is unavailing here. *For the purpose of deciding the constitutional questions appellant raises we must take the statute as though it read precisely as the highest court of the State has interpreted it.*" (Italics ours.)

(5) The United States Supreme Court is bound by the common law of the state for it has no common law of its own. As stated by Mr. Justice Brandeis, in the case of *Erie R. Co. v. Tompkins*, 304 U. S. 64 at 78:

> "And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law."

(6) A federal question is frivolous and devoid of merit where it rests on an obviously false assumption (as in the case at bar where merely peaceful picketing is postulated), or where it is contrary to the established law settled by the United States Supreme Court (as held by the decision of this Court in the case of Meadowmoor Dairies, Inc., supra), or where it is obviously only a state question (the labor policy of the State of Wisconsin as interpreted by this Court in the *Senn case*, supra, Cf. *Bacon v. Martin*, 305 U. S. 380).

(7) Only those who have been injured as a result of a denial of constitutional rights can invoke the jurisdiction of this Court on constitutional questions (*Voeller v. Nielston Warehouse Co.*, 312 U. S. ...., 61 Sup. Ct. 376; *Liberty Warehouse Co. v. Burley*, 276 U. S. 71); the petitioners herein do not represent the minority, have not picketed peacefully but their utterances were, in paraphrasing the language of this Court in the *Meadowmoor case* (312 U. S. ...., 61 S. Ct. 552 at 555),

> "in a context of violence that lost their significance as an appeal to reason and became part of an instrument of force. Such utterances were not meant to be sheltered by the Constitution."

III.

The Wisconsin Employment Peace Act and Especially Sec. 111.06 (2) (e) Thereof Is a Valid Exercise of the State's Police Powers.

A. Analysis of Wisconsin Employment Peace Act.

If this Honorable Court still wishes to consider the constitutionality of Sec. 111.06 (2) (e) Wis. Stats. despite

the proven violence in the record and the failure of a substantial federal question, it is believed that statute can be sustained as a valid exercise of the sovereign police powers of the State of Wisconsin under the Tenth Amendment to the United States Constitution relating to the reserved powers of the states. This of course, requires a fair analysis devoid of a "fire to pervert" and recognition of the principle that a state statute should not be declared unconstitutional unless it clearly appears to be so beyond a reasonable doubt.

In testing the constitutionality of the Wisconsin Employment Peace Act and especially Sec. 111.06 (2) (e) thereof "on its face," we must consider the entire Act in order to ascertain the true legislative intent. We must observe that Sec. 111.06 (2) (e) thereof specifically refers to concerted or cooperative action of a group, for it provides that it shall be an unfair labor practice for an employee—

> "*to cooperate* in engaging or promoting or inducing picketing, boycotting or other overt concomitants of a strike unless a majority of any collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike." (Italics ours.)

As the State Supreme Court noted in its opinion (S. R. 56), Subsection (e) of the Act—

> "by its terms does not apply to an individual; an individual cannot cooperate with himself. Subsection (e) does not forbid an employee to quit his employment individually or in concert with others."

The Legislature further provided by Sec. 111.15 Wis. Stats. that the Act shall not be construed to impede the right to strike and the right of individuals to work or to invade unlawfully the right of free speech. Even if an employee is found guilty of an unfair labor practice because of failing

to comply with Sec. 111.06 (2) (c), he loses only the benefits granted employees under the Act but still retains all his rights under the Constitution, the statutory law and the common law, as provided by Sec. 111.07 (1) Wis. Stats., as construed by the State Supreme Court (S. R. 58, 59). These legislative mandates were carefully observed by the State Supreme Court in its opinion construing Sec. 111.06 (2) (c), (S. R. 55, 56).

B. State's Power Over Manifestations of Force in Labor Matters.

That the State of Wisconsin has the right to control all manifestations of force, fraud and fear whether practiced by physical means or otherwise within its borders, and to regulate the use of the coercive weapons of industrial strife —the lock-out, the strike, picketing, boycotting and other overt concomitants of a strike—by powerful combinations of either capital or labor acting in concert is now firmly established by decisions of the highest state and federal courts. In the exercise of this police power Wisconsin has declared it criminal to concert together for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession, by any means whatsoever (Sec. 343.681 Wis. Stats.), or by threats, intimidation, force or coercion of any kind to hinder any other person from engaging in any lawful work (Sec. 343.683 Wis. Stats.). These statutes have been held to be constitutional and to apply particularly to malicious mischief of combinations subject to legislative repression as declared by this Honorable Court speaking through Mr. Justice Holmes in *Aikens v. Wisconsin*, 195 U. S. 194.

In addition to the aforesaid criminal enactments, Wisconsin has provided a Labor Code which declares what con-

stitutes lawful conduct in labor disputes (Sec. 103.53 Wis. Stats.) The Code permits peaceful picketing but it specifically conditions this conduct upon the absence of intimidation, coercion, fraud, violence, breach of the peace or threat thereof, and expressly states that nothing therein shall be construed to legalize a secondary boycott. This Wisconsin Labor Code was held to be constitutional and a valid exercise of the State's police powers in *Senn v. Tile Layers Protective Union*, 301 U. S. 468, where peaceful picketing in Wisconsin was fully defined by the great liberal jurist, Mr. Justice Brandeis who concluded (p. 481):

> "The laws of Wisconsin as declared by its highest court, permit unions to endeavor to induce an employer when unionizing his shop to agree to refrain from working in his business with his own hands. * * * Whether it was wise for the State to permit the Unions to do so is a question of public policy—not our concern. The Fourteenth Amendment does not prohibit it."

Again in the case of *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323, the aforesaid Wisconsin Labor Code, especially Sec. 103.53 thereof, was carefully examined and found binding upon the federal courts.

The more recent pronouncements of this Honorable Court summarize and crystallize the power of the State in matters of labor relations. Thus, it is stated in *Thornhill v. Alabama*, 310 U. S. 88 at 103:

> "The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern."

In *A. F. of L. v. Swing*, 312 U. S. ...., 61 Sup. Ct. 568 at 570, we find this significant language:

> "That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic."

After admonishing judges not to be so innocent of the actualities of industrial conflict and recognizing that the Judiciary has no power to formulate state policy or pass upon the wisdom of state labor codes, this Court properly observed in the recent *Meadowmoor Dairies* case, 312 U. S. 61 Sup. Ct. 552 at 556:

> "We are here concerned with power and not with the wisdom of its exercise."

If the State of Wisconsin has the power to enact valid criminal and civil laws relating to Labor Relations as shown above, then it must also have the power to enact the Wisconsin Employment Peace Act to provide for unfair labor practices covering both employers and employees. It must also have the power to prevent the defeat of its labor policy seeking industrial peace, regular and adequate income for employees and uninterrupted production of goods and services. To deny the State appropriate means to attain the object of its power is in effect to deny the existence of its power. Thus, in *Cantwell, et al., v. Connecticut*, 310 U. S. 296 at 307 and 308, this Court stated the declaration of a state's policy as distinguished from a mere common law concept would weigh heavily in any challenge of the law as infringing constitutional limitations and that:

> "No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious."

Likewise, in the case of *Minersville School District, et al. v. Gobitis*, 310 U. S. 586, it was held that the local Board of

Education in Pennsylvania and the legislature of that state could constitutionally require children to take the oath of allegiance to the flag and give the flag salute without infringing upon the due process of law or invading the right of religious freedom and liberty guaranteed by the Fourteenth Amendment. It was stated by Mr. Justice Frankfurter in delivering the opinion of the Court (p. 595, 600):

> "*National unity is the basis of national security.* To deny the legislature the right to select appropriate means for its attainment presents a totally different order of problem from that of the propriety of subordinating the possible ugliness of littered streets to the free expression of opinion through distribution of handbills. * * * Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. *But to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties.*" (Italics ours.)

Only by a strict adherence to the rule of segregation of powers can the independency of the Judiciary itself be preserved in our democratic form of government.

C. The Majority-Minority Classification is an Accepted Reasonable Form of Legislative Classification in Labor Matters.

The petitioners argue at length in their Petition and Brief (pp. 24-28) that the majority-minority classification provided by Sec. 111.06 (2) (e) Wis. Stats. is arbitrary, unreasonable, indefinite and harsh in its operation. Political economy teaches us that the right aim of legislation is the carrying out of the principle of utility, or, in other words, the proper end of every law is the promotion of the greatest happiness for the greatest number. We know from the science of jurisprudence that a right is nothing more than

a permission to exercise certain material powers and upon certain conditions to obtain protection, restitution or compensation by the aid of public force (Cf. Mr. Justice Holmes, The Common Law, p. 214; John Austin, Jurisprudence, 5th Ed. Lecture 6).

Now the "public force" that is behind the law under question is the force of the mandate of the Legislature of the State of Wisconsin as contained in Sec. 111.06 (2) (e) Wis. Stats. The Legislature, not the workers by majority vote, has definitely determined what constitutes unfair labor practices as a matter of law in the State of Wisconsin; the workers are merely required to meet fixed legislative standards for the safety of themselves, the employer and the public generally. National unity and security in the uninterrupted production of goods and services, the stabilization of employment, the adequacy of workers' income and the peaceful adjustment of labor controversies are thereby secured. The workers ascertain by secret ballot the question of fact, namely, *whether the dispute with the employer is so substantial and meritorious as to warrant a general strike.* They do not determine whether any worker may strike or work. They do not determine whether any worker may peacefully picket or otherwise truthfully publicize the facts of a labor controversy. When such fact of substantiality or lack of substantiality in a labor controversy has been ascertained, fixed legislative standards have been met and the law is self-executing in determining what *concerted and coercive instrumentalities of industrial strife* may or may not be used in both an authorized and an unauthorized strike. Sec. 111.06 (2) (e) Wis. Stats. as construed by the Wisconsin Supreme Court, aided by explicit statutory provisions (Sec. 111.15 Wis. Stats.) prohibiting any construction that interferes with the right to strike or the right to free speech, applies only to an unauthorized strike. The attempted use

of *concerted picketing and boycotting* in an *unauthorized* strike is determined to be merely an unfair labor practice — not a crime resulting in the imposition of fines or imprisonment and not even a civil wrong entitled to legal damages by way of reparation. Although one may be found guilty of an unfair labor practice by reason of the provisions of Sec. 111.06 (2) (e) Wis. Stats., he still retains all his rights under the Constitution, the common law and other state statutes, for it is recognized by Sec. 111.07 (1) Wis. Stats. that nothing in the Wisconsin Employment Peace Act shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction. This is fully explained in the State Supreme Court's original opinion (S. R. 56-61).

Sec. 111.06 (2) (e) Wis. Stats. is a mere application of the Majority Rule which is fundamental in the attempt of the Legislature and of Congress to regulate labor relations. It is the principle upon which the National Labor Relations Act and the Railway Labor Peace Act and the Wisconsin Employment Peace Act is based. It is the principle whereby the most important affairs of life, including the administration of justice, are determined in the legislative, judicial and executive departments of our democratic form of government. It is the familiar principle upon which the equitable maxim "Equality is Equity" is based. In a labor election held for any purpose the vote of each worker represents an equity. The majority vote represents the majority of the equities. The "group interest" of all the workers is prior and paramount to the "individual interest" of a single worker who by force of his association with his fellow-workers subjects and subordinates his personal selfish interest. If a single worker does not agree with the majority, his right to strike, continue work, peacefully assemble with other members of the minority, protest, reason, speak freely and publish truthfully the facts of the labor dispute is not

even regulated, much less prohibited, by the Wisconsin Employment Peace Act and especially Sec. 111.06 (2) (e) thereof. So the Act reads and so the State Supreme Court decided (S. R. 55, 56, 58, 64).

Trade unions themselves govern both their internal affairs with their members and their external relations with the employer and the public by the Majority Rule. Labor's philosophy advocating the all-union or closed shop clearly recognizes and in fact is based on this rule. Was Labor ever heard to demand a unanimous vote of the workers before obtaining a closed shop in any plant? Was Labor ever heard to complain that a majority vote of the workers for a closed shop was insufficient, denied equal protection of the law and resulted in an arbitrary, unreasonable and discriminatory classification of legislative subjects (Petitioners' Brief, p. 25)? Has Labor ever demanded unanimity of vote for the election of union officers? Or, to fine, suspend or expel a recalcitrant member? Or, to call a strike, picket and boycott any particular industry or its non-union employer? Certainly not. The group interest of the majority determining the substantiality and the merit of these questions prevailed against the wishes of any dissenting member or opposing minority. Again we ask, why may not the Legislature adopt similar procedure in the exercise of its police powers relating to labor relations that affect the public interest and the national unity and security so profoundly?

The difficulties petitioners conjecture that workers will have under the statute to obtain the necessary majority vote by secret ballot are more imaginary than real. The hypothetical cases they cite in their Brief (p. 25) are doubtful and extreme. These dialectics like generalizations are always invidious. For example, what constitutes mass picketing? Why should two or three pickets at a single narrow en-

trance of a small retail store constitute mass picketing and, therefore, unlawful conduct in one case, and twenty or thirty pickets distributed before several wide entrances of a large manufacturing plant not constitute mass picketing and, therefore, lawful conduct in another case. The answer is that each case must be decided on its own facts and circumstances. Application of the law to a particular case must be left to the "trier of fact" if there is room for conflicting inferences. With good reason this Honorable Court in the case of *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, observed:

> "Whatever terminology is used, the criterion is necessarily one of degree and must so be defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided for by the great concepts of the Constitution, such as 'interstate commerce,' 'due process,' 'equal protection.' In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion. There is, thus, no point in the instant case in a demand for the drawing of a mathematical line and what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases."

In the Petitioners' Brief (pp. 27 and 28), the alleged right to use concerted picketing, boycotting and other overt concomitants of an unauthorized strike whenever and wherever petitioners see fit and however destructive to employers, working employees and the public, is claimed comparable to the right of a citizen in the exercise of free speech to protest the results of a public election. The petitioners would apply the Majority Rule in creating collective bargaining units and also in electing exclusive bargaining representatives. Here, however, they stop. According to their argument any member of a collective bargaining unit should

be allowed, in the exercise of free speech, not only to express freely his own opinion and protest the decision of the majority, but also to reject with or without cause all the labor matters negotiated by the duly elected exclusive bargaining representative and accepted by the majority of his fellow workers. Furthermore, he should be allowed the use of destructive instrumentalities of concerted economic force in conjunction with powerful nation-wide labor combinations *in order to coerce the members of the majority who voted contrary to his wishes* to change their vote. He should be permitted thereby to threaten them with the loss of their jobs by destroying their employer's business. He should be permitted to deprive them of the right of self-organization by denying finality to their vote on all important labor matters. If threats and intimidation fail, usually violence and breaches of the peace ensue, as in the case at bar. All this is done theoretically in the name of free speech, but practically with an eye to defeat others in the exercise of their rights to self-organization and collective bargaining.

Only economic chaos can follow from the above labor philosophy of Discord and Destruction. It cannot be the law in any civilized community which hopes to exist during the present turbulent times as a government of laws rather than a government of men. In comparing the right to seek the change of an employee's vote on a labor question with the right of citizens in a public election to change the votes of other citizens on political questions, the petitioners overlook the undeniable fact that the votes of citizens on political questions may not lawfully be changed by threatening them with the loss of their means of livelihood, their right to self-organization, liberty, property and freedom from force, fear and fraud. This does not mean that the rights to freedom of speech, of the press and of assemblage are allowed to the majority alone and denied to the minority because they are

in the minority. On the contrary, these rights were expressly preserved for *both the majority and the minority* by the Wisconsin Employment Peace Act as construed by the State Supreme Court in its original opinion (S. R. 55, 56, 58 and 64) and in its final opinion denying the motion for rehearing (S. R. 71). Just as the petitioners now so vehemently protest against the mandates of the Wisconsin Legislature as construed by the State Supreme Court, so also may they protest to the people of the State of Wisconsin and their legislative representatives against the wisdom or the lack of wisdom of the particular labor statute under attack or any other statute. Certainly, the courtroom is not the arena for debating issues of legislative policy.

It is either adult sophistry or sophomoric immaturity to claim as petitioners do in their Brief (pp. 25 and 26) that there exists no clear danger of substantive evils in concerted picketing, boycotting and other overt concomitants of an unauthorized strike, especially during these times of national defense armament. Now, if ever, the sovereign police powers of the state making for stabilization of employment, adequacy of income, uninterrupted production of goods and services and peaceful adjustment of labor controversies, are of paramount importance. Now, if ever, we must have national unity and national security. Strikes like wars are never profitable, but extremely wasteful, economically, politically and socially. Destruction of workers' jobs by impulsive and shortsighted labor leaders calling strikes contrary to the wishes of the workers themselves is suicidal in this economic world. If the workers themselves may combine under the state and federal law to organize and select collective bargaining units and exclusive bargaining representatives by a majority vote, then why may they not likewise ascertain the question of fact pertaining to that matter particularly within their personal knowledge, namely,

whether the wages, hours, working conditions or any other substantial item of labor controversy, is such in their particular employment as to warrant the calling of a general strike? Do not the majority labor under the same working conditions as the minority? Do they not share the gains and suffer the losses involved in labor matters together as a unit?

The Oregon case of *A. F. of L. v. Bain*, 106 Pac. (2d) 544, cited in Petitioners' Brief (pp. 26-27) is easily distinguishable for it involved *a penal statute* directed against *individual* action, including the exercise of free speech in *any and every form of peaceful picketing.* (See Wisconsin Supreme Court's analysis of this case in S. R. 56, 57). The Oregon statute was devoid of any protective provisions as contained in Sec. 111.15 Wis. Stats. preventing the invasion of free speech and in Sec. 111.07 (1) Wis. Stats., preserving for an ex-employee participating in an unauthorized strike his rights under the Constitution, the statutory law and the common law. Furthermore, the Oregon statute was not narrowly drawn to cover the precise situation giving rise to the danger incidental to the use of certain coercive instrumentalities of an industrial strife conducted by *concerted action of labor combinations.* This is indicated in the split opinion of the Oregon Supreme Court when the majority said:

> "We are far from implying by our decision that proper regulatory measures may not be taken by the state to curb evils arising from activities of labor unions, as of every other group. No right is held absolute—not even the right to speak freely."

The case of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, cited in Petitioners' Brief (p. 28), is not pertinent at all to the case at bar. It involved the Sherman Anti-Trust

Act and an Illinois anti-trust statute containing *penal provisions* and *no separability clauses*. The Wisconsin Employment Peace Act does not contain any penal provisions imposing criminal fines or imprisonment for its violation. Furthermore, it contains a separability clause (Sec. 111.18 Wis. Stats.). It does not unreasonably discriminate between majority and minority groups but expressly preserves to the minority the right to strike and free speech as contained in Sec. 111.15 Wis. Stats. and the right to all legal and equitable relief in courts of competent jurisdiction as contained in Sec. 111.07 (1) Wis. Stats.

D. The Qualified Right of Free Speech is Neither Involved nor Invaded.

Petitioners claim in their Brief (pp. 18, 36) that in the exercise of their coercive activities as labor combinations, they may use certain instrumentalities of economic force and industrial strife (concerted picketing, boycotting and other overt acts concomitant of a general strike) whenever and wherever they see fit and however destructive to the employer, working employees and the general public under the guise of free speech and the State of Wisconsin is powerless to control them. This is an abuse of the right of free speech. History and Law have always looked upon this right as a *Shield against Oppression and not a Sword of Aggression* (Cf. *Lovell v. Griffin*, 303 U. S. 444, 451, *Thornhill v. Alabama*, 310 U. S. 88, 101, 102). Reasonably limited, this freedom is a "*privilege*" in a free government but without such limitation it might become the "*scourge of the republic*" (Justice Joseph Story, *On The Constitution*, Volume 2, Sec. 1580, p. 634).

It is a fundamental principle, long established, that freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right beyond the reasonable control of the State and the Federal Government (*Gitlow v. New York*, 268 U. S. 652). As Mr. Justice Holmes stated in *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. 247 at 249:

> "The most stringent protection of free speech * * * does not even protect a man from an injunction against uttering words that may have all the effect of force."

Under such circumstances speech becomes what has been called "a verbal act" and is as much subject to injunction as the use of any other force whereby property is unlawfully damaged (*Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418). It is a cardinal error to affirm that the right of free speech is so absolute that it may be exercised under any circumstances and without qualifications; like other rights that exist in a civilized society it must always be exercised with reasonable regard for the conflicting rights of others (*Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229). The same is true in regard to the exercise of the constitutional right of religious freedom (*Cantwell v. Connecticut*, 310 U. S. 296; *Minersville School District, et al., v. Gobitis*, 310 U. S. 586) and free press and assemblage (*Schneider v. State*, 308 U. S. 147, *Hague, et al., v. C. I. O.*, 307 U. S. 496).

The petitioners cite throughout their Brief passages from this Court's decision in the *Thornhill v. Alabama* (310 U. S. 88) and the *Carlson v. California* (310 U. S. 106) cases in support of their alleged legal conduct in picketing. They ignore the record of violence in the case at bar. They overlook the facts and the nature of the statutory provisions under review in both the *Thornhill* and the *Carlson* cases. Neither the Milwaukee Circuit Court (R. 43-44) nor the

Wisconsin Supreme Court (S. R. 55, 56, 70-71) denied the imperative legal effect of these cases, but fully discussed and clearly distinguished them on the basis of the factual situation appearing in the record and the nature of the Wisconsin Employment Peace Act under review. They pointed out that unlike the Wisconsin Statute in the case at bar, the enactments in the *Thornhill* and the *Carlson* cases contained criminal terms and penal clauses providing for fines and imprisonment and were so applied by the state courts as to prohibit even an individual from peacefully publicizing *in any manner whatsoever* the true facts of a labor dispute. They pointed out that the individuals in the above cases were found not guilty of any threats, intimidation, coercion, violence or breach of the peace for, "all words spoken were uttered in a peaceful and orderly manner without putting any one in fear." They observed implicitly the caveat of this Honorable Court stated in both the above cases, to-wit:

> "The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives and the property of its residents cannot be doubted."

Lastly, in full recognition of this Court's decision in the above cases, the Wisconsin Supreme Court stated explicitly in its original opinion (S. R. 56) and again in its final opinion (S. R. 71) that Sec. 111.06 (2) (e) of the Wisconsin Act does not prohibit peaceful picketing as described in the *Thornhill* case. Where, therefore is the basis for the petitioners' claim (pp. 35 and 36 of Brief) that all picketing, including the free communication by any means whatsoever, was prohibited by the Wisconsin Employment Peace Act as construed by the State Supreme Court?

It is a strain upon our credulity to hear petitioners and their attorneys, who have engaged in labor activities for

many years, confess at this late date that they do not know what constitutes peaceful picketing under the Wisconsin law (p. 36 of Brief). It is amusing to note the facility with which they define this term when they argue the rights of labor in other cases. The alleged "vague contours" of the term "picketing" as used in the Wisconsin Statutes and decisions did not confuse them in the least when they argued for those rights in the cases of *American Furniture Co. v. I. B. of T. C.* (1936), 222 Wis. 338, 268 N. W. 250; *Senn v. Tile Layers Protective Union* (1936), 222 Wis. 383, 268 N. W. 270, 268 N. W. 875; *Wisconsin Labor Relations Board v. Fred Ruepping Leather Co.* (1938), 228 Wis. 473, 279 N. W. 673. If more authoritative legal determinations of what constitutes peaceful picketing in Wisconsin are needed, the petitioners well knew they could be found in decisions of this Court construing and applying Wisconsin labor legislation in the cases of *Senn v. Tile Layers Protective Union*, 301 U. S. 468, and *Lauf v. E. G. Shinner & Co., Inc.*, 303 U. S. 323. The Milwaukee Circuit Court in its decision found (R. 45):

> "All of the terms in the 'Employment Peace Act' are sufficiently definite and have been judicially defined many times. * * * The Act is sufficiently definite and certain in terminology which may be said to include 'well-understood concepts of the law,' (*Wisconsin Labor Relations Board v. Fred Rueping Leather Co.*, 228 Wis. 473 at 495)."

The State Supreme Court by a process of elimination definitely ruled out any general prohibition of peaceful picketing as described in the *Thornhill* case in the enforcement of Sec. 111.06 (2) (e) Wis. Stats. in the State of Wisconsin when it stated in its original opinion (S. R. 56):

> "The term 'picketing' as used in Subsection (2) (e) of Sec. 111.06 Stats., 1939, does not include acts held in the Thornhill case, supra, to be within the protection of the constitutional guaranty of the right of free speech.

> The express language of the Act forbids such a construction. It clearly refers to that kind of picketing which the Thornhill case says the state has the power to deal with 'as a part of its power to preserve the peace, and protect the privacy, the lives and the property of its residents.'"

This language was repeated almost verbatim in the final opinion of the State Supreme Court denying the motion for rehearing (S. R. 70-71).

By way of verbal legerdemain the petitioners seek to inject into the record of this case contempt proceedings that are now pending before the Milwaukee Circuit Court. In support thereof they again inaccurately allege facts that are not of record (Brief pp. 29, 36). Our aaswer is that the record in the pending contempt proceedings is separate and distinct from the record in the case at bar; it forms no part of these proceedings for it has not been introduced in evidence as part of this record; it concerns acts committed by the petitioners subsequent to the decisions of the Milwaukee Circuit Court and the State Supreme Court here under review. The conduct for which the petitioners are being charged with contempt does not consist merely of peaceful picketing or the writing of letters to prospective customers not to patronize the hotel as alleged by the petitioners (Brief pp. 29, 36). The bases of the contempt charge consist of manifestations of force, mass picketing enmeshed with unlawful boycotting and unfair advertising resulting in continuing fear and fraud to the employer, his working employees and the public generally. This Honorable Court will not anticipate by presumption that the Milwaukee Circuit Court will so construe the Labor Board's order confirmed by the state courts' decisions so as to put it to an abnormal use by way of enforcement or make an unlawful invasion upon free speech guaranteed by the Constitution. No application

has been made by the unions herein to modify or vacate the orders of the Wisconsin Labor Board and the judgments of the Supreme Court on the ground that the continuing intimidation or coercive effect of their past violence has disappeared. Therefore, the language of this Court in *Milk Wagon Drivers Union, et al. v. Meadowmoor Dairies, Inc.*, 312 U. S. ....., 61 Sup. Ct. 552, is highly pertinent and fully applicable to the record in the case at bar, to-wit:

> "Since the Union did not urge that the coercive effect had disappeared either before us or, apparently, before the state court, that question is not now here."

Lastly, it is claimed by the petitioners (pp. 35 and 36 Brief) that the order of the Board confirmed by the judgments of the Wisconsin courts is more comprehensive than necessary or proper under the doctrine of this court in the *Meadowmoor case*, supra. This claim is based upon the fact that the violence in the case at bar was not as extreme as that appearing in the Meadowmoor case. It suffices to say that the Wisconsin Labor Board, the Milwaukee Circuit Court and the Wisconsin State Supreme Court passed upon this question of fact and that the numerous unprovoked and most reprehensible assaults and batteries in the case at bar were sufficient to warrant the issuance of the Cease and Desist Order now under review. The conduct enjoined was the—

> "(a) Engaging in promoting or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;
>
> "(b) Attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employees of the Plankinton House Company;
>
> "(c) Boycotting in any way the Plankinton House Company."

It is submitted that this order is no broader than the injunc-

tion issued by the Illinois Supreme Court in the Meadowmoor case and confirmed by this Court when it stated (61 Sup. Ct. 552 at 557):

> "The injunction is confined to conduct near stores dealing in respondent's milk and it deals with this narrow area precisely because the coercive conduct affected it. An injunction so adjusted to a particular situation is in accord with the settled practice of equity, sanctioned by such guardians of civil liberties as Mr. Justice Cardozo. (Cf. *Nann v. Raimist*, 255 N. Y. 307, 174 N. E. 690, 73 A. L. R. 669). Such an injunction must be read in the context of its circumstances. Nor ought state action be held unconstitutional by interpreting the law of the state as though, to use a phrase of Mr. Justice Holmes, one were fired with a zeal to pervert."

If the continuing fear and intimidation generated by the past violence and misconduct of the petitioners has ceased, not only familiar equity procedure accords them the opportunity for modifying or vacating the order of the Board and the judgments of the state court, but express provisions of the Wisconsin Employment Peace Act assures the petitioners this right to relief. Thus, Sec. 111.07 (1) Wis. Stats. provides:

> "Any controversy concerning unfair labor practises may be submitted to the Board in the manner and with the effect provided in this chapter, *but nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction.*" (Italics ours.)

The Wisconsin courts, therefore, were always open to give the petitioners the appropriate equitable relief as and when they were entitled to it. There was no basis upon which the state courts could reasonably anticipate that the fear and intimidation generated by the past violence and unlawful conduct would immediately cease upon the rendition of their judgments. On the contrary the trial court found (R. 20 and 21):

"The Board was justified in concluding that the violent methods, assaults or disturbances which were pursued or which ensued from the outset and from time to time thereafter were ample to characterize the whole campaign or to warrant a reasonable inference that the attitude of the picketers was *continuously threatening or that threatening conduct would be resorted to should conditions be favorable for the purpose.*" (Italics ours.)

This prophetic foresight of the Milwaukee Circuit Court was fully justified by the subsequent events. As heretofore stated, the petitioners made no application to modify or vacate the Order of the Board as confirmed by the courts but continued in their unlawful conduct. As a result, as late as March 21, 1941, the Attorney General for the State of Wisconsin was forced to institute contempt proceedings against them to prevent their continuous manifestations of force, fear, unfair advertising and realistic picketing enmeshed with illegal boycott and picketing en masse.

CONCLUSION

It is submitted that the Petition for Writ of Certiorari should be denied because the record herein shows:

(1) Undisputed evidence of past violence and continuing fear and intimidation;

(2) The non-existence of a substantial federal question;

(3) The Decisions of the Wisconsin Supreme Court so construe Sec. 111.06 (2) (e) Wis. Stats. as not to invade the right to strike or the right to free speech; the Statute so construed is unquestionably constitutional.

Respectfully submitted,

HERMAN M. KNOELLER,
Attorney for
Plankinton House Company,
Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 124

HOTEL & RESTAURANT EMPLOYEES INTERNATIONAL ALLIANCE, LOCAL No. 122; PHIL L. VALLEY, JOHN ALEXANDER, and JACK HEISDORF, each individually, as Business Agent, Organizer, and Vice President, respectively, for and as representatives of all the members of Hotel & Restaurant Employees' International Alliance, Local No. 122;

INTERNATIONAL LAUNDRY WORKERS, LOCAL No. 174;

BARTENDERS INTERNATIONAL LEAGUE OF AMERICA, LOCAL No. 61, sometimes known as International Bartenders & Beverage Dispensers, Local No. 61;

INTERNATIONAL UNION OPERATING ENGINEERS, Local No. 311;

MILWAUKEE BUILDING TRADES COUNCIL;

All affiliated with the American Federation of Labor,
Petitioners and Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD; HENRY C. FULDNER, individually and as chairman of, L. E. GOODING, individually and as a member of, R. FLOYD GREEN, individually and as a member of the Wisconsin Employment Relations Board;

PLANKINTON HOUSE COMPANY, a Corporation,
Respondents and Appellees.

BRIEF OF RESPONDENT WISCONSIN EMLOYMENT RELATIONS BOARD OPPOSING GRANTING WRIT OF CERTIORARI

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PLANKINTON HOUSE COMPANY, a Corporation,
Respondents and Appellees.

BRIEF OF RESPONDENT WISCONSIN EMLOYMENT RELATIONS BOARD OPPOSING GRANTING WRIT OF CERTIORARI

I.

OPINIONS OF THE COURT BELOW

The petition for writ of certiorari seeks to review a decision of the Supreme Court of Wisconsin, 236 Wis. 329,

294 N. W. 632, rendered November 8, 1940, and a decision of said court denying motion for rehearing, 236 Wis. 329, 295 N. W. 634. The decision denying motion for rehearing was rendered January 7, 1941 (R 47, 68).[1]

II.

NATURE OF THE CASE

The decisions above referred to affirmed the judgment of the Circuit Court of Milwaukee County, dated May 14, 1940, sustaining, confirming and enforcing an order made by the Wisconsin Employment Relations Board on February 15, 1940 (C 47-51 inc.).

The Plankinton House Company (hereinafter referred to as the Company) is a corporation which operated the Plankinton House and Kilbourn Hotel, both located in the City of Milwaukee (C 251). On or about the 20th day of November, 1939, the Company filed complaint with the Wisconsin Employment Relations Board (hereinafter referred to as the Board) charging the unions, the officers and agents thereof (petitioners for certiorari herein) and the members thereof with unfair labor practices, towit, violation of section 111.06 (2) (a) (e) (f) (g) (h) and (j) and

---

[1] The paging of the record is confusing. The record consists of (1) the case used in the Supreme Court of this state, (2) the supplemental case, and (3) the proceedings in the Supreme Court. These later proceedings are numbered 42 to 72 inclusive. It will simplify the citation to refer to such pages as Record (R) and when reference is made to the case and supplemental case to refer to them respectively as C and SC.

Certified copies of original exhibits referred to in the case are likewise returned and filed as part of the record.

sec. 111.04 of the Employment Peace Act[1] (C 8, 64-69 inclusive).

The unions, their officers and agents answered in substance denying such unfair labor practices and raising a number of constitutional issues with respect to the validity of Ch. 57, Laws of 1939 (The Employment Peace Act) (C 8-9, 70-80 inclusive).

After due notice of hearing an extensive hearing was held before the full Board (C 9, 81-250 inclusive).

On February 15, 1940 the Board made its findings of fact, conclusions of law and order (C 251-262 inclusive). The order required the involved unions (petitioners for certiorari) the officers, members, agents, successors and assigns of each, to

"1. Immediately cease and desist from:

(a) Engaging in promoting or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;

(b) Attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of the Plankinton House Company;

(c) Boycotting in any way the Plankinton House Company.

"2. Take the following affirmative action, which the Board finds will effectuate the policies of the act:

(a) Post notices to their members in conspicuous places at the union headquarters that the union

---

[1]The Act is printed as Appendix "B" to the petition for writ of certiorari and the brief filed in support thereof, pp. 59-77 inclusive.

has ceased and desisted in the manner aforesaid, and that all officers, members and agents of the union are to refrain from engaging in promoting or inducing picketing and boycotting of the Plankinton House Company, and also to refrain from attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of the Plankinton House Company.

(b) Notify the Board in writing forthwith that steps have been taken by each of the respondent unions to comply herewith." (C 261)

The petitioners for certiorari herein then petitioned the Circuit Court for Milwaukee County for a review of the order of the Board (C 2-6 inclusive) pursuant to the provisions of sec. 111.07 (8) of the Employment Peace Act. The Board answered and cross petitioned for enforcement of its order (C 6-11 inclusive). The Circuit Court, on May 14, 1940, entered judgment sustaining, confirming and enforcing the order of the Board (C 47-51 inclusive).

The petitioners for certiorari in this court appealed from that judgment to the Supreme Court of the State of Wisconsin and that court, in the decisions above referred to (p. 1 of this brief) affirmed the judgment of the Circuit Court.

III.

THE FACTS

A. The collective bargaining agreement with the unions.

The unions involved herein are voluntary, unincorporated associations, each affiliated with the American Federation of Labor (C 251). On the 16th day of June, 1938, the Plankinton House Company entered into a collective bargaining contract with said unions, which contract covered wages, hours and working conditions governing the employees of the Plankinton House and the Kilbourn Hotel, the contract providing as a condition of such employment that all employees coming within the terms of said contract must be and remain members of one of the respective unions so long as they were employed by the Company (Finding 5 of the Board, C 252).

The contract further provided that it was to continue for a period of one year, ending on the 15th day of June, 1939, and for consecutive one year renewals unless either party served notice in writing on the other party at least thirty days before the expiration of such year that said party decided to terminate the agreement at the end of such contract year. It was further provided that either party might notify the other party in writing within thirty days of the date of termination of such contract that it desired the contract continued for an additional year, and that such party desired to negotiate hours, wages and working conditions for the following contract year. If such notice were sent, the contract was to continue in force and

the terms agreed upon by virtue of such subsequent negotiations were to be retroactive from the date of the commencement of any such year. If the parties could not reach an agreement through negotiations on or before thirty days after the termination of the preceding contract year, the difference was to be submitted to arbitration in accordance with the procedure prescribed by the contract. Such arbitration was to be final and binding on both parties, but if either party were dissatisfied with the arbitration award, the right to strike or lock-c was reserved to the union and the company respectively (Finding 6 of the board, C. 253).

B. The Negotiations

The Plankinton House Company had notified the unions that it desired its contract to continue for another year and that it desired to negotiate hours, wages and working conditions for such additional contract year (Finding 8 of the Board, C 254, Ex. 3). The unions had given similar notice to the Hotel Company (Finding 7 of the Board, C 253, Ex. 2, 16). The representatives of the interested parties met on June 27, 1939 to negotiate (Ex. 54). Other hotels besides those conducted by the Plankinton House Company were involved in the negotiations. The representatives of the hotels felt that with the number of the interests that were involved in the transaction and so that there might be no misunderstanding as to any of the discussion that took place, a court reporter should be present. Mr. Goldberg, attorney for the unions, refused to negotiate with a court reporter present. Nothing much seems to have been ac-

complished at the aforesaid meeting other than to suggest that the parties submit their desired changes in writing. This was done.

The unions presented their proposed contract revisions (Exhibit 5). The proposals were not unreasonable and were such as to form a fair basis for negotiation. Thereafter, the Plankinton House Company submitted in writing its suggested contract revisions. These revisions were submitted about July 1, 1939 (Finding 9 of the Board, C 254, Ex. 6). By comparison of Exhibit 6 and Exhibit 1, it will be seen that the changes desired by the Plankinton House Company were substantially as follows:

1. That the article relating to exclusion of employees from membership in the union be enlarged to include others who were in close relationship to the management or had some supervisory duties.

2. That the arbitration provision be changed so as to eliminate the provision that either party should have the right to a strike or a lockout in the event such party was dissatisfied with the arbitration award.

3. That the closed shop provision of the contract be eliminated.

4. That the seniority clause be revised to make it more flexible and workable.

5. That there be a classification of hotels in the city for the purpose of wage scale, such classification, however, not to affect present wages.

All of these requests were reasonable and legitimate subjects of negotiation.

The response to the involved hotels' suggested changes

was a letter dated July 11, 1939 (Exhibit 7) in which it was stated that the counter-proposals embodied therein were highly unacceptable and unsatisfactory. The letter was in the following tenor:

> "* * * We regret to note that the tenor of such revisions evinces an anti-labor attitude on the part of your respective clients, and we can only say that in all probability this is a natural consequent of the recent anti-labor laws passed by the Wisconsin Legislature. * * *"

The letter further states:

> "In view of the seeming impossibility to get together Local 122, Hotel & Restaurant Employees International Alliance of America, in accordance with Articles I and III, which provide there shall be no strike or lockout arising out of failure to negotiate a contract unless arbitration be had, the said Local 122 herewith demands arbitration affecting its contract, and herewith designates Phil L. Valley and I. E. Goldberg as its representatives on said arbitration board."

(Note the very thinly veiled regret that it is necessary to arbitrate before striking.) The letter also enclosed a proposed letter and the attorneys representing the involved unions stated that they proposed to send said letter to the National Letter Carriers Association unless a contract were executed by Saturday, July 15, 1939. The letter concludes:

> "We hope that after due consideration your clients will think better of their position, and will enter into a contract with the unions, and not make necessary arbitration or the sending of the letter to the convention committee of the Letter Carriers' Association."

The sample letter to be sent to the convention committee on July 15 (quite regardless of arbitration) accuses the involved hotels (with honest differences to arbitrate) as having taken an arbitrary anti-union attitude, blacklists the involved hotels, and requests the convention committee to inform all its locals throughout the country to advise their delegates to refrain from making reservations at such hotels and also that if they have made reservations to cancel the same.

C. The Arbitration Proceedings

The points of difference between the involved unions and the involved hotels were submitted to arbitration September 20, 1939 (Exhibit 19), the intervening time apparently having been consumed in endeavoring to agree upon a fifth arbitrator, inability to agree thereon and finally the appointment of Alfred H. Handrich by the Wisconsin Employment Relations Board (Exhibits 8, 19; Finding 10 of the Board, C 254).

The involved hotels submitted their differences with the involved unions to the board of arbitration and in a true spirit of arbitration. The unions did not. Exhibit 19 (the arbitration proceedings) is an exhibit with respect to which we invite the court's most careful consideration. It appears very clearly from the exhibit that the five matters heretofore mentioned which the hotels wanted embodied in a new contract were all matters of vital importance to the involved hotels. The Plankinton Hotel was the only one of the involved hotels that appeared to be making any money

and it was making a very small return upon the capital invested. The Hotel Wisconsin Company had not made any money since 1931 (Exhibit 19, page 51). The result of operations during the preceding year was a net loss of $42,649. The operations for the current year (1939) were resulting in a worse loss than the preceding year. The operations in 1937, which was a very good year for hotels comparatively, resulted in a loss of over $6,000 for the Wisconsin Hotel Company. They had not made a profit for a period of seven or eight years (Exhibit 19, page 52). The company owned two 99 year leases and the present rental payable under those leases was $20,000 a year. The owners of the ground had not received a cent of ground rent since 1933 because there wasn't any money available for that purpose. The company was in default to the extent of approximately $100,000 in taxes (Exhibit 19, page 52).

Mr. Goldberg stated many times that the uniform hotel contract used in Milwaukee was the finest in the country (Exhibit 19, page 54). Granted that to be true, its very fineness presented serious management problems to these hotels. The hotels were far from exhibiting an anti-union or unfair labor attitude in endeavoring to arrive at some solution of their problems.

The article relating to the exclusion of employees from membership in the union to be enlarged to include others who were in close relationship to management and who had supervisory duties, was a most reasonable request. The exclusion of the front office help from the contract at the Plankinton (persons very close to management) involved about 10 people (Exhibit 19, page 62) out of a total of 188 (C 158). At the Medford Hotel, it involved 8 employees out

of 121. The matter of clarifying that provision in the contract also involved honest operations by other hotels under the terms of their contract with the union. This point appears very conclusively (Exhibit 19, page 55 et seq.).

Ordinarily those in close relationship to management and having supervisory duties are not eligible for membership in a union of operation employees. It is difficult for such employees to serve two masters. When nationally organized unions seek to have company dominated unions disestablished, one of the points invariably pointed out to establish company domination is that of membership in the company union of employees who are close to management.

The unions' attitude upon this request was no different from that upon all of the other requests. With respect to every request that the hotels endeavored to seriously arbitrate, the unions' attitude was one of adamant opposition thereto, a complete refusal to even listen to it and a threat to strike if the request were considered and granted by the board of arbitrators. The arbitration was one of arbitrating with a shotgun and with the shotgun pointed at the fifth arbitrator.

There can be no real arbitration under such circumstances. Exhibit 19 is a conclusive argument with respect to the reasonableness of point 2 which the hotel submitted for arbitration, namely, that of an arbitration clause which amounted to something and which would make the arbitration award binding upon the parties. It was calculated to make the arbitration clause amount to something other than waste motion and it was calculated to put the parties in a position where both would have to arbitrate upon the merits rather than by the shotgun process.

Point 3 involved elimination of the closed shop or all-union provision in the contract. The hotels took the position that said clause was not in accordance with the spirit of Ch. 57, Laws of 1939 (the Employment Peace Act) and that they disliked compelling employees to join a union if the employees did not want to do so. This matter finally came down to a point where the involved hotels signified their willingness to having a closed shop provision in the contract provided the employees wanted a closed shop provision and voted therefor at an election to be conducted by the Wisconsin Employment Relations Board. The attitude of the involved hotels was a most reasonable one and in accordance with existing law (Exhibit 19, page 71 et seq.).

The 4th point submitted to arbitration, namely, a requested revision of the seniority clause so as to make it more flexible and workable, was most reasonable. The reasons therefore are stated at page 70 of Exhibit 19. The seniority clause is a most troublesome clause in any union contract with employers. There necessarily has to be some flexibility in it. The seniority rule in state or national service, while a desirable rule, if rigid and unflexible, will often mean that the incompetent and unadaptable are filling jobs that the competent and adaptable should fill. The seniority rule, while undoubtedly desirable in any union contract or in state or national service, does make for round pegs in square holes and without considerable flexibility makes for inefficiency and serious management problems.

The argument for the classification of hotels (the fifth point submitted by the hotels for arbitration) is presented on page 64 of Exhibit 19. No one could say that the request was an unreasonable request and with respect to hotels

operating at losses or upon an extremely small margin of profit, it would seem that the request was a necessary one if the hotels were to survive.

D. The Arbitration Award

On October 30, 1939, the board of arbitration issued its award, the two members appointed by the involved unions dissenting (Exhibit 9). The award in general granted all of the union requests for revision (none of the requests had been opposed by the involved hotels). The only provision granted in the award which had been urged by the hotels was a provision that a closed shop was to be effective only upon the condition that the employees of the respective hotels involved, by a secret ballot conducted under the supervision of the Wisconsin Employment Relations Board, voted in favor of a closed shop by a 75% majority. This provision conformed to the provisions of sec. 111.06 (1) (c) regarding all-union contracts. On November 1st, the Plankinton House Company notified the unions' attorney, Mr. Goldberg, of its acceptance of the arbitration award and that it was ready to enter into a contract in accordance with the provisions thereof (Exhibit 10, Finding 13 of the Board, C 256).

E. The strike and the conduct engaged in during the course thereof

At about 4 o'clock on November 2, 1939, the business manager of Local 122, Phil L. Valley, "pulled" the strike

(C 84, 85) and ordered all employees in every department of the Plankinton House and Kilbourn Hotel to cease work. A picket line of 75 or 80 pickets was thrown about all the entrances to the hotels and the pickets continued to parade before the entrances at the time of the hearing before the board (C 85).

Prior to the calling of the strike, the employees of the Plankinton House Company did not vote by secret ballot to call such strike. This fact was expressly stipulated by the unions' attorneys (Finding 15 of the Board, C 256, 82). The strike was called at a time when the hotel was full of school teachers who were in Milwaukee for the teachers' convention (C 155),—a time calculated to cause just as much harm and injury to the hotel as the unions could cause and to cause as much inconvenience to the public as could be caused, not to mention the fear and intimidation directed at the guests of the hotels.

The picketing was characterized by booing, hissing, sneering and hooting at guests (C 158). The manager of the hotel was spit upon one night (C 158). On at least one occasion the pickets carried clubs in their hands in front of the hotel (C 158). The campaign was characterized by threats of physical violence directed at the employees by spitting upon them and by calling them vile names (C 101, 104, 136, 139, 140, 141, 142, 145, 146, 148).

Numerous inexcusable assaults and batteries occurred and many of them were committed by responsible officers of the union and those actively in charge of the picketing. The pickets by force attempted to prevent the delivery of products and commodities to the hotel and resorted to the secondary boycott. In numerous instances the union pro-

vided counsel and paid the fines of those arrested for assaults. All of the foregoing appear from findings of the board (not challenged) nor are they denied in the record. For convenient reference to the violent and inexcusable conduct and the details connected therewith, we set forth the findings of the board on these matters, as well as citation to the pages of the case and record where the details may be found (Findings of the Board, C 257 et seq.).

> "Phil L. Valley is business manager of Hotel and Restaurant Employees International Alliance, Local No. 122, and as such business manager, notified Marquette University and the Milwaukee School of Engineering, directing that all students working at the Plankinton House for their meals be ordered to immediately discontinue such work, and that unless such students did discontinue work at the Plankinton House, that the union would be forced to stop the employment of university students working at other hotels and restaurants in the City of Milwaukee which had collective bargaining contracts with Local No. 122" (Finding 17, C 114-120).

> "On November 4, 1939, union pickets, by means of force, prevented delivery to the Plankinton House of floral decorations by one Joseph Mueller, an employe of August F. Kellner Company. That as a result of the altercation at said time, Jack Heisdorf, Vice-president of Local No. 122, Hotel and Restaurant Employees International Alliance, and Charles McLaughlin, Assistant to the secretary of Local No. 122, were arrested, and on November 17, 1939, convicted of assault and battery, McLaughlin being fined ten dollars and costs, and Heisdorf being fined five dollars and costs, the sentence against Heisdorf being suspended and he was

placed on probation for thirty days. That Local No. 122 provided counsel and bail for both Heisdorf and McLaughlin, and paid McLaughlin's fine" (Finding 19, C 102-104).

"Charles McLaughlin returned to the picket line immediately after his arrest, and on November 17, 1939, assaulted one Lester Raasch, an employe of the Plankinton House, was again arrested, convicted, and fined twenty-five dollars and costs, and the union again provided him with counsel and paid such fine" (Finding 20, C 91, 137).

This was on an occasion when Raasch was attempting to carry salt into the hotel (C 137).

"On November 4, 1939, two salesmen representing the Automotive Electrical Association, who were attempting to deliver displays and samples to the Plankinton House, were, by means of force, prohibited from making the delivery by Phil L. Valley and a number of pickets" (Finding 21, C 139, 140).

Phil L. Valley was the business manager of Local 122. Not only was the delivery prevented but it was stated by Heisdorf, vice-president of the Union (C 85) that the doors might as well be locked and barred because nothing was going to get in or out of the building (C 140).

"On November 10, 1939, Jack Heisdorf, Charles Alden, striking employe of the Plankinton House, and other pickets, by the use of force, prevented delivery of ice cubes to the Plankinton House, and in the course of the attempted delivery, Charles Alden assaulted Robert Jeske, then an employe of the Plankinton House" (Finding 22, C 104, 112, 113, 125, 126).

"On November 17, 1939, Paul Zeibell, an employee of the Plankinton House, was assaulted by James O'Brien, a picket employed by the union, and stationed on the picket line at the Plankinton House. O'Brien was arrested, convicted and fined five dollars and costs" (Finding 23; C 132-136).

"On November 14, 1939, Edward Knopf, an employe of the Plankinton House, was assaulted by John Thomas O'Maher, a picket stationed by the union at the Plankinton House, and a striking employe of the Plankinton House" (Finding 24; C 145).

"On November 17, 1939, Rudolph Stano, an employe of the Plankinton House, was assaulted by Joseph Hofich, a picket stationed at the Plankinton House by the union, and Hofich was arrested, convicted, and fined five dollars and costs" (Finding 25, C 149).

Amended finding 26 is as follows: (page 271 of printed case)

"On November 17, 1939, Thomas James, an employe of the Plankinton House was assaulted by Larry McAllen, a picket stationed at the hotel by the union, and said Larry McAllen was thereafter arrested, convicted and fined five dollars and costs" (C 143-144).

"Throughout the strike, the City of Milwaukee caused to be stationed at the Plankinton House throughout the twenty-four hours of each day, six police officers for the purpose of maintaining order" (Finding 27, C 197)

Other instances of like conduct not adverted to in the board's findings may be found in the record as follows: C 140, 150; 151, 158.

The attorney for the unions endeavored to get the Busi-

ness Institute of Milwaukee, occupying some nine rooms of space in the hotel, to break its lease with the hotel (C 121, 122).

John W. Polcyn, Captain of the Milwaukee Police Department, testified to seven distinct arrests and convictions of pickets at the property of the Plankinton House Company because of violence, crimes and misdemeanors (C 194-196).

About two weeks before December 11, 1939, shingle nails were spread about the parking lot on several occasions and after pickets, ranging to ten in number, were standing near said lot (C 146-147, Exhibit 20).

On November 19th a stench bomb was found in the hotel. The liquid had been generously distributed along about thirty feet of the hallway immediately adjacent to some of the dining rooms (C 156, 157).

On November 26, 1939 the rear elevator window on the main floor was broken by a large stone having been thrown through it (C 157, Exhibits 22 and 23)

On November 11, 1939 after the strike had been in progress for some nine days, the unions' effort to adjust is evidenced by the business manager's letter of November 11th (Exhibit 12) in which demand was made (1) that the Plankinton House Company execute the same supplemental agreement which the 27 major hotels had agreed to and (2) that the hotel give all employees in Local 122 a uniform 10% raise.

On November 28, 1939, the union wrote the Plankinton House Company that under the terms of the contract they could hire no new employees except from the union and that the employees so hired would refuse to work (Exhibit 13).

148 out of 188 former employees had returned to work and were employees of the company at the time of the hearing before the board (C 158).

IV.

QUESTIONS PRESENTED

It is asserted in the petition for the writ of certiorari (p. 2) as follows:

> "The so-called 'Wisconsin Peace Act' sought to repudiate, and does pervert, the basic principles of the National Labor Relations Act and the 1937 Wisconsin Labor Relations Act patterned after it. The foundation on which the National Labor Relations Act rests is equalization of the bargaining power of employers and employees. The so-called 'Wisconsin Employment Peace Act' removes the principle of equalization and again reinvests in employers powers far in excess of those possessed by employers before the passage of any labor relations act in this country."

It is further asserted on pages 6 and 7 as follows:

> "This case is one in which the validity of the statutes of the State of Wisconsin, towit, Sections 111.01 through 111.19, Wisconsin Statutes, 1939, particularly Section 111.06 (2) (e) thereof, and an order and enforcing judgment based thereon, is drawn in question upon the ground that such statutes, order and judgment, on their face and as construed in the opinion and judgment of the Supreme Court of the State of Wisconsin, are repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, as depriving the petitioners of liberty or property without due process of law, denying to the petitioners the

equal protection of the laws, and more particularly, denying to the petitioners freedom of speech. The decision of the Wisconsin Supreme Court was in favor of the validity of the statute and order."

It will be seen from the able and exhaustive decision of the Circuit Court of Milwaukee County (C 12-47 inclusive) that many questions were presented to that court. However, upon appeal to the Supreme Court the petitioners for certiorari herein abandoned all questions except that of the constitutionality of sec. 111.06 (2) (e) of the Act, and the point that the order deprives the union, its officers, members and agents from exercising the constitutional rights of freedom of speech, press and assemblage guaranteed by the Fourteenth Amendment to the constitution of the United States and Article I of the State of Wisconsin.

Errors were assigned as set forth in Footnote 2, page 8 of the petition. None of the Board's findings of fact were challenged. They could not be seriously challenged. Nor was any question raised as to the constitutionality of the Act as a whole. The petitioners for the writ herein directed their sole attack upon the constitutionality of sec. 111.06 (2) (e) of the Act. This is specifically pointed out by the Supreme Court at least twice in the opinion (R 53, 70, 71). The constitutionality of the Act as a whole was not before the Wisconsin Supreme Court in this case and accordingly is not before this court.

The Act as a whole (not the constitutionality of it) is before this court upon this petition only because other relevant sections of the Act must be given full force and effect in determining whether any substantial federal question is presented by the petition for the writ.

V.

POSITION OF THE BOARD WITH RESPECT TO JURISDICTION

It is the Board's position that the case presents no substantial federal question. The case is brought to this court on the ground that it involves a justiciable controversy under sec. 237 (b) of the Act of Congress dated February 13, 1935 (28 U. S. C. A. 344 (b)') providing, inter alia, that this court has jurisdiction to review by certiorari the final judgment of the highest court of any state determining the validity of a state statute allegedly repugnant to any provision of the United States Constitution. The position of the respondent board in this respect is:

(1) That there is no substantial federal question involved;

(2) The assumed federal question is frivolous and devoid of merit because it rests on obviously false assumptions not appearing in the record, namely, merely peaceful picketing and "peaceful persuasion disentangled from violence and free from picketing en masse or otherwise conducted so as to occasion imminent and aggravating danger" (*American Federation of Labor v. Swing*, 312 U. S. —, 61 Sup. Ct. 568, 85 L. ed. 513 (1940); *Thornhill v. Alabama*, 310 U. S. 88, 84 L. ed. 659 (1940); *Carlson v. California*, 310 U. S. 106, 84 L. ed. 668 (1940);

(3) The assumed federal question is further frivolous and devoid of merit because it is contrary to the established law settled by this court in the case of *Milk Wagon Drivers Union of Chicago, Local 753, et al., v. Meadowmoor Dairies, Inc.*, 312 U. S. —, 61 Sup. Ct. 552, 85 L. ed. 497 (Adv. Op., 1941).

VI.

SUMMARY OF ARGUMENT

A. Summary analysis of Ch. 57, Laws of 1939 (The Employment Peace Act).

B. By the express language of sec. 111.15 of the Act, both the Board and the courts are prohibited from applying sec. 111.06 (2) (e) of the Act so as to invade the constitutional right of freedom of speech.

C. Within the rule of *Milk Wagon Drivers' Union v. Meadowmoor Dairies*, 312 U. S. --, 85 L. ed. 497, no substantial federal question is presented by the record in this case. The strike, from its inception, was set in a context of violation, force, intimidation, and coercion.

D. The obvious remedy of the petitioners for this writ, if they wished to engage in peaceful picketing at or near the Plankinton House or the Kilbourn Hotel was that of applying to the Circuit Court for Milwaukee County for a modification of the decree.

E. Answer to petitioners' argument in support of the petition.

1. Sec. 111.06 (2) (e) is not unconstitutional and void and of no effect whatsoever because it contravenes the guarantee of free speech and equal protection of the laws afforded by the Fourteenth Amendment to the Constitution of the United States.

2. Sec. 111.06 (2) (e) and the order based thereon do not deny equal protection of the laws for the reason that the statute does not embody reasonable classification.

3. The order is not more comprehensive than necessary and proper under the doctrine of the *Meadowmoor case*.[1]

A. Summary analysis of Ch. 57, Laws of 1939 (the Employment Peace Act)

The Act is narrowly drawn and permits both the Board and the courts to deal with each individual case upon the factual situation presented by that case. For purposes of opposing the granting of this writ it is unnecessary to argue extensively the purpose and scope of the Employment Peace Act, Ch. 111, Wisconsin Statutes (Appendix "B", Petitioners' brief) or, to analyze extensively the sincere legislative effort to balance the rights of all major interests involved in industrial strife. The purpose is set forth in the declaration of policy, sec. 111.01 of the Act. Sec. 111.01 (1) recognizes that there are three major interests involved in employment relations, namely: the public, the employee and the employer, all of which intrests are interrelated. The purpose and policy of the state is to protect and promote each of these interests with due regard to the situation and the rights of the others.

The Act, by sec. 111.01 (2) recognizes that industrial peace, regular and adequate income for the employee and uninterrupted production of goods and services are promotive of all of these interests and that they are largely

[1]Petitioners' arguments are to the contrary upon all points.

dependent upon the maintenance of fair, friendly and mutually satisfactory employment relations and the availability of suitable machinery for the peaceful adjustment of whatever controversies may arise.

The Act recognizes by sec. 111.01 (3) that negotiations of terms and conditions of work should result from voluntary agreement by the employer and employees; for purposes of such negotiations an employee has the right, "if he desires, to associate with others in organizing and bargaining collectively through representatives of his own choosing, without intimidation or coercion from any source."

Sec. 111.01 (4), in its declaration of policy provides:

> "(4) It is the policy of the state, in order to preserve and promote the interests of the public, the employe, and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated.
>
> "While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat."

The Act, by sec. 111.02, sets up comprehensive definitions for the purposes of administering the Act. The whole Act is based upon recognition of the principle of collective bargaining units and that of the majority rule within those units. This latter principle is the very foundation rock and principle upon which the collective bargaining structure is erected. Without recognition of such principle the entire structure of the collective bargaining system is without

foundation or base. The system necessarily results in the majority speaking for and binding minorities. This principle is explicit in the National Labor Relations Act and in the Railway Labor Act.

The Act, by sec. 111.06 (1), (a) to (l) inclusive, sets up employer unfair labor practices. The Act, by sec. 111.06 (2) (a) to (j) inclusive, sets up employee unfair labor practices and by sec. 111.06 (3) it is provided:

> "It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employes, or in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by subsections (1) and (2) of this section."

The employee unfair labor practices, established by sec. 111.07 (6) (2), Stats., are, in the main, practices which are recognized as unlawful conduct in a labor dispute in all jurisdictions.

Sec. 111.03 provides for the Employment Relations Board (the administrative tribunal). Sec. 111.05 provides for representatives and elections to be conducted by the Board and sec. 111.05 (3) provides for a review of the Board's final certification of the results of such elections.

Sec. 111.07 provides for hearings before the Board and for the prevention of unfair labor practices. Sec. 111.07 (7) makes provision for the Board's petitioning the Circuit Courts of the state for enforcement of its orders. Sec. 111.07 (8) provides for an aggrieved party petitioning the Circuit Court for a review of a Board order. Sec. 111.10 and Sec. 1111.11 respectively, provide for arbitration and mediation.

B. By the express language of sec. 111.15 of the Act, both the Board and the courts are prohibited from applying sec. 111.06 (2) (e) of the Act so as to invade the constitutional right of freedom of speech.

The challenged section, sec. 111.06 (2) (e), reads as follows:

> "(2) It shall be an unfair labor practice for an employe individually or in concert with others:
>
> "* * *
>
> "(e) To cooperate in engaging in, promoting or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employes of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike."

Sec. 111.15 provides as follows:

> "Except as specifically provided in this chapter, nothing therein shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work; nor shall anything in this chapter be so construed as to invade unlawfully the right to freedom of speech. And nothing in this chapter shall be so construed or applied as to deprive any employe of any unemployment benefit which he might otherwise be entitled to receive under chapter 108 of the statutes."

Sec. 111.06 (2) (e), the challenged section, is obviously grounded upon recognition of a principle which must be recognized as the base and foundation of the entire collective bargaining process, namely, that of majority rule within a collective bargaining unit.

Sec. 111.15 in turn, by express language, prohibits both the Board and the courts from applying this section, as well as any other section of the Act so as to invade the constitutional right of freedom of speech. The two sections must be read together. The Supreme Court of the State of Wisconsin specifically so held in its opinions.

The Board is enjoined by the express language of sec. 111.15 from applying the section so as to invade the constitutional right of freedom of speech. Under the circumstances, both the Board and the courts deal with conduct upon the basis of the factual situation presented in each particular case. The orders of the Board are adjusted to the particular facts of the particular case and it is the duty of both the Board and the courts to see that those orders are adjusted to the particular facts of the particular case, and that the order and enforcement decree so adjusted do not deny any constitutional right of freedom of speech. Both the Board and the courts "deal with controversies through the concreteness of individual litigation rather than through the abstractions of a general law." *Milk Wagon Drivers' Union v. Meadowmoor Dairies*, 312 U. S. —, 85 L. ed. 497, 499.

C. Within the rule of Milk Wagon Drivers' Union v. Meadowmoor Dairies, 312 U. S. —, 85 L. ed. 497, no substantial federal question is presented by the record in this case. The strike from its inception was set in a context of violation, force, fear, intimidation and coercion.

It is only necessary to advert to the conduct of the strike set forth on pages 13 to 19 of this brief. The brief of the petitioners attempts to minimize the force and violence which occurred. The record however, speaks for itself. The whole campaign was characterized both by repeated threats of violence and by actual violence and the preventing, by force, of delivery of products to the hotels. The campaign was directed by the officers of the union. The officers engaged in the violence themselves and the union provided counsel fees and paid the fines of the members on the picket line who were arrested for the acts of violence.

Throughout the strike the City of Milwaukee had stationed six police officers each day for the purpose of maintaining order. The entire campaign was characterized by force, violence, intimidation and coercion,—any means to gain the end.

The picketing engaged in was not a mere appeal to reason in any sense of the term. It was mass picketing with 75 or 80 pickets thrown about all the entrances to the hotels. The picketing was not only characterized by violence, force, coercion, intimidation and continual threats of same, but by booing, sneering, jeering and hooting at guests. Spitting at the manager and employees seems to

have been an accepted practice (C 158, 136, 141, 142; SC 19, 20).

As the Supreme Court well said in its opinion on motion for rehearing, 236 Wis. 329, at page 354:

> "The appellant employees, unions, and officers are not in a position in this case to raise any question respecting the right peacefully to picket or the right of free speech. The picketing carried on in this case was not peaceful and the right of free speech is in no way infringed by the statute or the order of the board."

In *Thornhill v. State of Alabama*, 310 U. S. 88, 84 L. ed. 659, the court said:

> "The statute as thus authoritatively construed and applied leaves room for no exceptions based upon either the number of persons engaged in the proscribed activity, *the peaceful character of their demeanor*, the nature of their dispute with an employer; or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute."

Furthermore, in the *Thornhill case* the court states:

> "It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants. * * *"

The court further says:

> "The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted."

The Circuit Court of Milwaukee County in its decision (C 20-21) specifically grounds the decision and the judgment enforcing the order of the Board upon the following proposition:

> "Each case must turn on its own circumstances. In the cases at bar, the Board was justified in concluding that the violent methods, assaults or disturbances which were pursued or which ensued from the outset and from time to time thereafter were ample to characterize the whole campaign or to warrant a reasonable inference that the attitude of the pickets was continuously threatening, or that threatening conduct would be resorted to should conditions be favorable for the purpose. In this connection, constant presence of officers of the law and the nature of conduct employed were sufficient to warrant the Board's findings and conclusions."

Then again said opinion (C 44) the trial court stated:

> "* * * The record presents ample facts and circumstances to warrant the Board's further conclusion that the acts so found characterized the entire campaign from its inception and its order that, for those reasons, it should be terminated."

Furthermore, in the Supreme Court on motion for rehearing the appellants (petitioners herein) argued in their brief as follows:

"Since receipt of the supreme court's decision we have gone over it carefully and searchingly in order that we might have a clear and precise understanding of the basis for such decision.

"Only one thing was clear. That was that the Wisconsin supreme court, traditionally liberal and traditionally alert to protect the civil liberties of the citizens of this state, had placed its stamp of approval upon a statute, and an order based thereon, prohibiting minority groups from engaging in those rights guaranteed by the constitution of the United States. This for the sole reason that they were minority groups."

In answer to this assertion the court stated as follows:

"What counsel refer to is their claim that the act which provides that what is denominated in the opinion 'an unauthorized strike,' that is, one not made pursuant to a majority vote of employees, is an unfair labor practice, deprives the minority group of a constitutional right to strike and infringes the right of free speech. It is almost futile to attempt to reply to a contention of this kind in the face of the provisions of the statute and the explicit language of the opinion. Counsel continue to misinterpret the statute and, as a consequence, misunderstand the opinion.

"Section 111.15 of the Employment Peace Act provides, among other things:

" 'Except as specifically provided in this chapter, nothing therein shall be construed so as to *interfere with or impede or diminish in any way the right to strike* * * *; nor shall anything in this chapter be so construed as to *invade unlawfully the right to freedom of speech.*'

"The last sentence contained in the opinion is

'Since we interpret the order of the board to be coextensive with the statute as construed, we find it unnecessary to modify the order or judgment.'

"It is explicitly stated in the opinion that the order of the board, the judgment of the circuit court affirming it, and the opinion of this court did not deal with anything approaching peaceful picketing. We pointed out—

" 'In this case it is undisputed that numerous assaults were committed by pickets; that the pickets acted in concert; that the fines of these pickets were paid by the unions; that ingress and egress to and from the premises of the employer were prevented by force and arms. It was at conduct of that kind that the statute was aimed. It is conduct of that kind that is dealt with in this case. It is conduct of that kind that is declared to be an unfair labor practice by the statute, and from which the defendants are ordered to cease and desist. The statute does not even declare conduct of that kind to be unlawful, nor does it subject the offender to a criminal prosecution.'

"How this can be tortured into a statement that minority groups are, by the order affirmed in this case, prohibited from peaceful picketing as described in the *Thornhill case*, is beyond our understanding. Under the statute and the order of the board as interpreted and construed by the explicit language of the opinion, freedom of speech and the right peacefully to picket is in no way interfered with. The appellants could not be ordered to cease and desist from something they were not engaged in."

This decision was rendered upon January 7, 1941. The *Meadowmoor* decision in this court was rendered on January 18, 1941. It is perfectly apparent that that board in

applying the statute, the Circuit Court in applying the statute, and the Supreme Court of the state, in applying the statute, merely anticipated, and anticipated correctly, this court's holding in the *Meadowmoor case*.

D. The obvious remedy of the petitioners for this writ, if they wished to engage in peaceful picketing AT OR NEAR the Plankinton House or the Kilbourn Hotel (the only picketing which the order requires them to cease promoting or engaging in) is that of applying to the Circuit Court for Milwaukee County for a modification of the decree.

Section 111.07 (1) provides as follows:

> "Any controversy concerning unfair labor practices may be submitted to the board in the manner and with the effect provided in this chapter, but nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction."

This section is given the very widest scope by the Supreme Court in its opinion in this case (pp. 345, 347, 348, Wis. citation). The court in the exercise of its equitable power could modify the order of the board as enforced by the courts at any time upon showing made that any provision of the order as enforced is no longer warranted in that the coercive effect of the fears engendered by past violence, force, threats and other intimidating conduct has been cured through lapse of time as well as by bona fide change in attitudes. Upon such application the court could and unquestionably would give the widest possible scope to all consti-

tutional pronouncements in the *Meadowmoor, Swing, Carlson, Thornhill* and all other cases of like tenor or import.

It will be seen from the opinion of the trial court (C. 12-47) that that court held "advertising the facts of a labor dispute" to be freedom of speech entitled to constitutional protection considerably before this court decided the Carlson and Thornhill cases. The petitioners herein do not choose to avail themselves of that perfectly obvious remedy but on the contrary ask this court to take jurisdiction by certiorari on arguments all of which are predicated upon the proposition that the courts of the state of Wisconsin are not competent to construe their own statutes and that sec. 111.06 (2) (e) of the Act must be construed as the petitioners claim it must be construed (and this in spite of the fact that the Supreme Court of the State has said it cannot be so construed and has refused to so construe it) and in total disregard of sec. 111.15 which prevents both the Board and the courts from applying the section in a manner so as to infringe any constitutional right of freedom of speech.

E. Answer to petitioners' argument in support of the petition

1. Sec. 111.06 (2)(e) is not unconstitutional and void and of no effect whatsoever because it contravenes the guarantee of free speech and equal protection of the laws afforded by the Fourteenth Amendment to the Constitution of the United States.

The argument contra completely ignores the construction placed upon sec. 111.06 (2) (e) by the Supreme Court of the state as well as sec. 111.15, Stats., which prohibits

both the Board and the courts from applying the section so as to contravene the guarantees of free speech.

The petitioners state (page 15 of the brief):

> "The first question presented for consideration is whether Section 111.06 (2) (e), prohibiting peaceful picketing in connection with a strike where such strike was not authorized by a majority of employees in a particular unit, contravenes the Fourteenth Amendment."

Doubt is conceded as to whether any such issue is presented by the particular facts of the case. Obviously no such issue is presented. As the Supreme Court said in its opinion (R 71):

> "The appellant employees, unions, and officers are not in a position in this case to raise any question respecting the right peacefully to picket or the right of free speech. The picketing carried on in this case was not peaceful and the right of free speech is in no way infringed by the statute or the order of the board."

See also the language quoted from said opinion, pages 31-32 of this brief.

The Supreme Court of the State of Wisconsin specifically held that sec. 111.06 (2) (e), when read in the light of sec. 111.15 could not be applied by the board so as to prohibit peaceful picketing as described in the *Thornhill* case.

The only question before the court was whether the statute and order of the Board violated any constitutional right of the petitioners herein under the Fourteenth Amendment (freedom of speech and equal protection of the laws).

That question has to be determined, not only in the light of sec. 111.06 (2) (e), but also in the light of sec. 111.15, Stats., which prevents both the Board and the Courts from applying the section so as to violate any constitutional right of freedom of speech.

In construing the statute both in the original opinion and in the opinion for rehearing, the court pointed out:

> "In this case it is undisputed that numerous assaults were committed by pickets; that the pickets acted in concert; that the fines of these pickets were paid by the unions; that ingress and egress to and from the premises of the employer were prevented by force and arms. It was at conduct of that kind that the statute was aimed. It is conduct of that kind that is dealt with in this case. It is conduct of that kind that is declared to be an unfair labor practice by the statute, and from which the defendants are ordered to cease and desist. The statute does not even declare conduct of that kind to be unlawful, nor does it subject the offender to a criminal prosecution."

The case on its factual situation in no sense presented a case in which a minority was ordered to cease and desist from peaceful picketing merely because they were a minority. They were ordered to cease and desist from picketing because of the conduct they engaged in, repeated acts of violence, threats, intimidation, and coercion,—a campaign characterized by lawlessness throughout. Petitioners so circumstanced are in no position to raise any question respecting the right to peacefully picket or the right to free speech. The order was adjusted to the conduct engaged in and upon the particular factual situation of the case.

The petitioners seek to inject the right of minorities to peacefully picket in the case (1) because the Board predicated its order upon sec. 111.06 (2) (e), (2) because the Circuit Court did not rely upon violence, and (3) because the Supreme Court did not base its opinion upon violence.

In the first place the Board's findings of fact, 19 to 27, (C 257-259 inclusive) are all directed to the violent method in which the campaign was conducted and the union's perfectly obvious connection therewith. It is obviously a rather far fetched argument to urge that the Board did not consider the element of violence, force, coercion, and intimidation which characterized the campaign in framing its order.

In any event the question before the Circuit Court as well as before the Supreme Court of the state was whether the order of the Board under the facts of the case did contravene any constitutional provision of free speech.

As to the second point that the decision of the Circuit Court of Milwaukee County was based upon the failure of the petitioners to comply with sec. 111.06 (2) (e), Stats.; as has already been pointed out[1], the Circuit Court grounded its decision upon the Board's findings of facts which characterized the entire campaign from its inception as one of justifying the Board in "concluding that the violent methods, assaults, or disturbances which were pursued or which ensued from the outset and from time to time thereafter were ample to characterize the whole campaign or to warrant a reasonable inference that the attitude of the picketers was continuously threatening, or that threatening conduct

[1]See p. 30 of this brief.

would be resorted to should conditions be favorable for the purpose" * * * "and its order that, for those reasons, it should be terminated."

As to the third point, the Supreme Court, both in its original decision and in its decision on motion for rehearing, did emphasize, and in unmistakable language, the violence, force, coercion and intimidating conduct which characterized the whole campaign (see quotation from the decision, page 29 of this brief).

The case does not present any question as to what a peaceful minority may do in carrying on an unauthorized strike under sec. 111.06 (2) (e), Stats. As was stated by the court in its opinion for rehearing:

> "We did not attempt, because it was not involved in this case, to distinguish between what a majority group may do in carrying on a strike from what the minority group may do. We pointed out that the statute nowhere prohibited employees from withdrawing from their employment either singly or in groups and certainly it in no way interferes with the right of free speech. Par. (e), as construed, does not prohibit, as described in the Thornhill case, peaceful picketing. We may say this, however, that the statute does not authorize the majority group, even though it has voted to strike, to commit acts of violence, to take possession of the employer's property and forcibly to prevent ingress and egress to and from the premises."

Petitioners urge (page 2 of their brief), in presenting their argument, that sec. 111.06 (2) should be construed upon its face. That, of course, is obviously untrue. It must be read in the light of sec. 111.15, Stats., which specifically

prohibits both the Board and the courts from applying the section in any manner so as to invade unlawfully the constitutional right of freedom of speech.

Petitioners keep urging throughout the argument that minority groups cannot be deprived of the right of freedom of speech just because they are minorities. Why the argument is considered apropos is not readily perceivable. The Supreme Court of the state has specifically said that minorities are not to be deprived of the right of freedom of speech just because they are minorities.

2. Sec. 111.06 (2) (e) and the order based thereon do not deny equal protection of the laws for the reason that the statute does not embody reasonable classification.

The argument contra upon this point of the case is presented on pages 24-28 of the petitioners' brief. The only point made seems to be that the minority has the right to peacefully picket just as much as the majority. Since the court has held that sec. 111.06 (2) (e) shall not be construed or applied so as to deny the constitutional right of freedom of speech[1], the point raised is without merit and is undistinguishable from the other point that the statute violates the constitutional right of freedom of speech.

The argument is further predicated upon the fact that a majority group would not have had to answer to the Board for the conduct engaged in in the instant case. A majority group would have had to answer to the board for the conduct engaged in.

It is urged that an obvious defect in such classification is in indefiniteness as to numbers. The point is wholly without substance and does not seem to be related to any

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[1]The court says, p. 35: "Par. (e) as construed, does not prohibit, as described in The Thornhill case, peaceful picketing."

point other than the point of peacefully picketing. That point has been fully covered.

Furthermore, as stated by the Supreme Court, the principle of majority rule within a collective bargaining unit is fundamental in the attempt of the legislature and of congress to regulate labor relations. The principle upon which authorized collective bargaining depends is that the rule of the majority within a collective bargaining unit shall bind the minority. Any infirmity in classification here is inherent in the classification in both the National Labor Relations and the Railway Labor Peace Act. (See opinion of the court, 236 Wis. 329, p. 346 (Adv. Sheet)).

As the classification is attacked only in relation to denial of the right of minorities to peacefully picket and as the court has specifically held that the statute is not to be so construed, as to deny to minorities such right[1], the petitioners obviously raise no new point not covered by their point "A" (petitioners' brief, pp. 17-24).

The petitioners are obviously in no position in this court to challenge the validity of the classification for purposes of determining what a peaceful minority may do in carrying on an unauthorized strike. They were not a peaceful minority. The case did not present any such question to the Supreme Court and of course presents no such question to this court. No principle of law is more firmly established than that no litigant can be the champion of constitutional rights except to the extent that his own rights are affected.

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[1]See quotations from the decision, p. 38 of this brief.

Lehon v. Atlanta, 242 U. S. 53, 56, 61 L. ed. 145;

Bandini Petroleum Co. v. Superior Court (1931), 284 U. S. 8, 76 L. ed. 136-145;

Southern Petroleum Co. v. King (1910) 217 U. S. 524, 534, 54 L. ed. 868.

As stated by Justice Cardozo in *Henneford v. Silas Mason Co.* (1937), 300 U. S. 577, 57 S. Ct. 524, 81 L. ed. 814:

"* * * The plaintiffs are not champions of any rights except their own." (p. 583)

3. The order is not more comprehensive than necessary and proper under the doctrine of the Meadowmoor case.

The order deals with a particular factual situation. It is by no means as broad or comprehensive in scope as the injunction dealt with in the *Meadowmoor* case. The order provides that the unions, the officers, agents, successors and assigns of each shall:

"1. Immediately cease and desist from:

(a) Engaging in promoting or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;

(b) Attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of the Plankinton House Company;

(c) Boycotting in any way the Plankinton House Company.

"2. Take the following affirmative action, which the Board finds will effectuate the policies of the act:

(a) Post notices to their members in conspicuous places at the union headquarters that the union has ceased and desisted in the manner aforesaid; and that all officers, members and agents of the union are to refrain from engaging in promoting or inducing picketing and boycotting of the Plankinton House Company, and also to refrain from attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of the Plankinton House Company.

(b) Notify the Board in writing forthwith that steps have been taken by each of the respondent unions to comply herewith."

The prohibition of picketing is confined to *at or near* the Plankinton House or the Kilbourn Hotel. The order does not purport to "prevent peaceful picketing" at any other place except "at or near the Plankinton House or the Kilbourn Hotel," the vicinity in which the campaign characterized by violence, force, threats, intimidation, et cetera.

Petitioners state (page 35 of their brief):

"In the instant case we do have an injunction which is a complete prohibition of all picketing and of all boycotting which would include in its broad meaning all other means of communication wholly unrelated to the violence involved. The prohibition against 'boycotting in any way the Plankinton House Company' is as all-inclusive and general an interdiction as could be imagined."

The criticism of the picketing provisions of the order is obviously without merit for the reasons immediately

above pointed out. Petitioners apparently urge that the boycotting provision of the order prohibits communication by letter, radio, newspaper, etc., concerning the facts of a labor dispute. The order cannot be so construed. The Supreme Court specifically repudiated any such contention in both the original opinion and in the motion for rehearing. The term "boycott" involves intimidating and coercive factors not involved in the mere publicizing of the facts involved in a labor dispute (freedom of speech).

Throughout the brief petitioners treat picketing and boycotting as synonymous terms. They have never been so treated. See Oakes' *Organized Labor and Industrial Conflicts*, p. 603 et seq.

At page 35 of the petitioners' brief it is stated:

> "We have pointed out that there is now pending in the Circuit Court for Milwaukee County a proceeding in which it is sought to hold the entire labor movement of the State of Wisconsin in contempt of court because of the writing of letters and making of public statements concerning the controversy at the Plankinton House."

A statement of similar import outside the record is presented on page 29 of petitioners' brief.

There is seldom excuse for presenting matters outside of the record. In a particular case when counsel does indulge in such luxury, it would seem only fair to expect that the matters outside the record be presented accurately. The statements made are in no sense accurate statements. The subsquent contempt proceedings which were instituted and which are not here involved presented all phases of the

petitioners' activities and those associated with them from the time of the rendition of the judgment of the Circuit Court to the date of the petition for contempt. We shall not argue that case here. Suffice it to state that the case involved many questions of law and fact. That case involved not only a contemptuous refusal to abide by the judgments of the courts of the state but all phases of the petitioners' activities and those associated with them. These activities were a far cry from the publicizing of the facts of a labor dispute. They were a far cry from the free competition of ideas in the open market of ideas entitled to constitutional protection. That case will be argued if and when it comes here. The instant case presents no substantial federal question.

We have checked our brief in the contempt proceeding and find no place in the brief where we ever took any such position, nor do we recall taking any such position in oral argument. So far as boycotting is concerned, the record in the contempt case presented in detail all coercive and intimidating factors, all force factors which would take the activities of the petitioners and their associates out of the field of peaceful persuasion and place them in the field of force (coercion).

CONCLUSION

For the foregoing reasons it is submitted that no federal question in substance is presented and that the writ of certiorari prayed for should be denied.

Respectfully submitted,

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Wisconsin Employment Relations Board.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 124

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL No. 122, PHIL L. VALLEY, JOHN ALEXANDER, and JACK HEISDORF, each individually, as Business Agent, Organizer, and Vice President, respectively, for, and as representatives of all the members of Hotel & Restaurant Employees' International Alliance, Local No. 122;
INTERNATIONAL LAUNDRY WORKERS, LOCAL No. 174;
BARTENDERS INTERNATIONAL LEAGUE OF AMERICA, LOCAL No. 61, sometimes known as International Bartenders & Beverage Dispensers, Local No. 61;
INTERNATIONAL UNION OPERATING ENGINEERS, LOCAL No. 311;
MILWAUKEE BUILDING TRADES COUNCIL;
All affiliated with the American Federation of Labor,
Petitioners and Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, HENRY C. FUELDNER, individually and as chairman of, L. E. GOODING, individually and as a member of, R. FLOYD GREEN, individually and as a member of the Wisconsin Employment Relations Board;
PLANKINTON HOUSE COMPANY, a Corporation,
Respondents and Appellees.

Brief of Respondent Wisconsin Employment Relations Board

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JAMES WARD RECTOR,
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POINT I.—SEC. 111.06 (2) (e) OF THE ACT, AS CONSTRUED BY THE STATE SUPREME COURT AND READ IN THE LIGHT OF ALL RELEVANT PROVISIONS IS NOT VIOLATIVE OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AS DEPRIVING THE PETITIONERS OR ANY MINORITY OF THE EXERCISE OF THE RIGHT OF FREEDOM OF SPEECH. 38-116

A. The petitioners' entire argument against the validity of sec. 111.06 (2) (e) is grounded upon a construction of that section repudiated by the State Supreme Court,—a construction which that court says the statute will not bear. 38

B. It is apparent from petitioners' argument that their real quarrel with the decisions under review is a quarrel with the Supreme Court's construction of th statute—such criticism raises no federal question. 43

1. The Supreme Court of the State merely took the traditional approach of the judiciary toward any question of statutory construction where constitutional rights are involved, namely that of adopting a construction which would not present any grave question of constitutionality,—of saving and not destroying even though the interpretation arrived at might not be the most obvious interpretation. 45

C. The Wisconsin Supreme Court in substance construed sec. 111.06 (2) (e) and the terms used therein to comprehend only violent, intimidating or coercive picketing, boycotting and other overt concomitants of a strike by persons acting in concert; decided that said section, when read in the light of sec. 111.15, could not be construed to deny a

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minority the right to peacefully picket or exercise the right of freedom of speech and that sec. 111.15 forbade any such construction—analysis of the decisions. 46

1. This construction of the statute by the Supreme Court of the State is as much a part of the statute as if the words were expressly written therein—that construction is binding upon this Court. 51

D. The challenged section as construed does not deprive petitioners or minorities of freedom of speech guaranteed by the 14th amendment as it regulates only conduct which falls outside of that area. 53

1. The petitioners not only misconstrue the challenged section but the argument made against the constitutionality thereof, however construed, is such an all-out argument for freedom of speech as an absolute right as to leave the legislatures of the several states completely powerless to cope with the problem of concert of action directed at injury of another so long as speech is a factor in accomplishing the injury—the principles for which petitioners contend are so utterly vicious as to destroy any society which harbors them. 54

2. The cases cited to support the argument obviously are of no such far reaching import—analysis of the cases. 55

E. Because of the construction placed upon the challenged section by the Supreme Court of Wisconsin there is no occasion for this Court to appraise the substantiality of the need for it but even if there is such occasion, it is manifest that there was and is a substantial need because of (1) the power given to labor under prior state legislation,

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(2) the abuse of this power by labor, (3) the bitter struggle then and now being waged within the ranks of organized labor,—the AFL—CIO conflict, (4) problems which arose out of new acts beneficial to organized labor such as the National Labor Relations Act and the State counterpart thereof, and (5) facts known to all with respect to the functioning of organized labor including peaceful picketing used as an instrument to perfect and maintain a boycott. 71

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A. The picketing at or near the hotels was set in a background of violence, force, fear, intimidation and coercion—the case is ruled by the Meadowmoor case. 122

B. The order was narrowly adjusted to the factual situation presented to the board and dealt with by the courts of the State—the petitioners were not prohibited from picketing any place except at or near the hotels. 124

1. The order is more narrowly drawn and adjusted to the factual situation dealt with than was the order in the Meadowmoor case. It does not prohibit advertising the facts of a labor dispute by any means whatsoever or at any place whatsoever except by use of picketing at or near the hoteds. 126

C. In sustaining the order of the board the courts of the State anticipated and anticipated correctly this court's holding in the Meadowmoor case. 134

1. The Trial Court's temporary stay order pending appeal to the Supreme Court of the State in no sense determined that it was unnecessary to prohibit picketing as prescribed by the order to eliminate from the case the coercive effect of past conduct or that similar conduct was not likely to be engaged in by petitioners at any propitious opportunity. 139

2. Both the Trial Court and the Supreme Court grounded the validity of the order in question upon the violent, intimidating and coercive conduct which characterized the campaign as continuously threatening and coercive far more than did the Supreme Court of Illinois in the Meadowmoor case. 2

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D. Even if the case at bar is not ruled by the Meadowmoor case, the order of the board nevertheless is not violative of petitioners' right to freedom of speech under the 14th amendment as the picketing engaged in was for the purpose of compelling the company to commit an unfair labor practice by entering into an all-union agreement with petitioners contrary to the provisions of sec. 111.06 (1), (c) and (e), Stats.—the picketing was for an unlawful object. 144

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 124

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL No. 122, PHIL. L. VALLEY, JOHN ALEXANDER, and JACK HEISDORF, each individually, as Business Agent, Organizer, and Vice President, respectively, for, and as representatives of all the members of Hotel & Restaurant Employees' International Alliance, Local No. 122;
INTERNATIONAL LAUNDRY WORKERS, LOCAL No. 174;
BARTENDERS INTERNATIONAL LEAGUE OF AMERICA, LOCAL No. 64, sometimes known as International Bartenders & Beverage Dispensers, Local No. 64;
INTERNATIONAL UNION OPERATING ENGINEERS, LOCAL No. 311;
MILWAUKEE BUILDING TRADES COUNCIL;
All affiliated with the American Federation of Labor,
Petitioners and Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD; HENRY C. FULDNER, individually and as chairman of, L. E. GOODING, individually and as a member of, R. FLOYD GREEN, individually and as a member of the Wisconsin Employment Relations Board;
PLANKINTON HOUSE COMPANY, a Corporation,
Respondents and Appellees.

Brief of Respondent Wisconsin Employment Relations Board

On October 13, 1941 this Court granted certiorari to review decrees of the Supreme Court of the state of Wisconsin which affirmed the judgment of the Circuit Court of Milwaukee county, dated May 14, 1940, sustaining, con-

firming and enforcing an order made by the Wisconsin Employment Relations Board on February 15, 1940 (R. I 47-52)*.

OPINIONS OF THE COURT BELOW

The original opinion of the State Supreme Court (R. II 48-64) is reported in 236 Wis. 329; 294 N. W. 632. The opinion denying motion for rehearing (R. II 69-71) is reported in 236 Wis. 329, 352; 295 N. W. 634.

JURISDICTION

The jurisdiction of this court rests on sec. 237B of the Federal Judicial code (28 U. S. C. A., sec. 344 (b)).

STATEMENT OF THE CASE

A. Nature of the case and the procedural facts

The Plankinton House Company (hereinafter referred to as the company) is a corporation which operated the Plankinton House and Kilbourn Hotel both located in the city of Milwaukee (R. I 251). On or about the 20th day of November, 1939, the company filed complaint with the Wisconsin Employment Relations Board (hereinafter referred to as the board) charging the unions, the officers and agents thereof (petitioners herein) and the members

*R. I refers to Vol. I of the Record. R. II refers to Vol. II of the Record.

thereof with unfair labor practices, to-wit, violation of sec. 111.06 (2) (a) (e) (f) (g) (h) and (j) and sec. 111.04 of the employment peace act*.. (R. I 8, 64-70).

The unions, their officers and agents answered in substance denying such unfair labor practices and raising a number of constitutional issues with respect to the validity of ch. 57, Laws of 1939 (the Employment Peace Act) (R. I 8-9, 70-81).

After due notice of hearing an extensive hearing was held before the full board (R. I 9, 81-251).

On February 15, 1940 the board made its findings of facts, conclusions of law and order. (R. I 251-263). The order required the involved unions (petitioners herein) the officers, members, agents, successors and assigns of each, to

"1. Immediately cease and desist from:

(a) Engaging in promoting or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;

(b) Attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of the Plankinton House Company;

(c) Boycotting in any way the Plankinton House Company.

*The Act is printed as Appendix "B" to the petition for writ of certiorari and the brief filed in support thereof, pp. 59-78. The complaint filed by the company is detailed and sets forth with particularity acts and instances alleged to constitute violations of the various subsections of sec. 111.06 (2) as set forth above (R. I 58-70). The complaint was not confined to violation of sec. 111.06 (2) (e) as might be inferred from petitioners' statement of the case (petitioners' brief, p. 6).

"2. Take the following affirmative action, which the board finds will effectuate the policies of the act:

(a) Post notices to their members in conspicuous places at the union headquarters that the union has ceased and desisted in the manner aforesaid, and that all officers, members and agents of the union are to refrain from engaging in promoting or inducing picketing and boycotting of the Plankinton House Company, and also to refrain from attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of the Plankinton House Company.

(b) Notify the board in writing forthwith that steps have been taken by each of the respondent unions to comply herewith." (R. I 261)

The petitioners herein then petitioned the Circuit Court for Milwaukee County for a review of the order of the board (R. I 2-7) pursuant to the provisions of sec. 111.07 (8) of the Employment Peace Act. The board answered and cross petitioned for enforcement of its order (R. I 6-12). The Circuit Court, on May 14, 1940, entered judgment sustaining, confirming and enforcing the order of the board (R. I 47-52).

The petitioners herein appealed from that judgment to the Supreme Court of the state of Wisconsin and that court, in the opinions hereinbefore referred to, affirmed the judgment of the Circuit Court.

B. The facts

1. The collective bargaining agreement with the unions

The unions involved herein are voluntary, unincorporated associations, each affiliated with the American Federation of Labor (R. I 251). On the 16th day of June, 1938, the Plankinton House Company entered into a collective bargaining contract with said unions, which contract covered wages, hours and working conditions governing the employees of the Plankinton House and the Kilbourn Hotel, the contract providing as a condition of such employment that all employees coming within the terms of said contract must be and remain members of one of the respective unions so long as they were employed by the company (Finding 5 of the board, R. I 252)*.

The contract further provided that it was to continue for a period of one year, ending on the 15th day of June, 1939, and for consecutive one year renewals unless either party served notice in writing on the other party at least thirty days before the expiration of such year that said party desired to terminate the agreement at the end of such contract year. It was further provided that either party might notify the other party in writing within thirty days of the date of termination of such contract that it desired the contract continued for an additional year, and that such party desired to negotiate hours, wages and working conditions for the following contract year. If such notice was sent, the contract was to continue in force and the terms agreed upon by virtue of such subsequent ne go-

*None of the findings of the board were challenged on the appeal to the State Supreme Court. They are, therefore, established verities upon this review.

tiations were to be retroactive from the date of the commencement of any such year. If the parties could not reach an agreement through negotiations on or before thirty days after the termination of the preceding contract year, the difference was to be submitted to arbitration in accordance with the procedure prescribed by the contract. Such arbitration was to be final and binding on both parties, but if either party were dissatisfied with the arbitration award, the right to strike or lock-out was reserved to the union and the company respectively (finding 6 of the board, R. I 253).

2. The negotiations

The Company had notified the unions that it desired its contract to continue for another year and that it desired to negotiate hours, wages and working conditions for such additional contract year (Finding 3 of the board, R. I 254, Ex. 3). The unions had given similar notice to the Company (Finding 7 of the board, R. I 253, Ex. 2, 16). The representatives of the interested parties met on June 27, 1939 to negotiate (Ex. 54). Other hotels besides those conducted by the Plankinton House Company were involved in the negotiations. The representatives of the hotels felt that with the number of interests involved in the transaction and so that there might be no misunderstanding as to any of the discussion that took place, a court reporter should be present. Mr. Goldberg, attorney for the unions, refused to negotiate with a court reporter present. Nothing much seems to have been accomplished at the aforesaid meeting other than to suggest that the parties submit their desired changes in writing. This was done.

The unions presented their proposed contract revisions (Ex. 5). The proposals were not unreasonable and were such as to form a fair basis for negotiation. Thereafter, the Company submitted in writing its suggested contract revisions. These revisions were submitted about July 1, 1939 (Finding 9 of the Board, R. I 254, Ex. 6). By comparison of Ex. 6 and Ex. 1, it will be seen that the changes desired by the Company were substantially as follows:

1. That the article relating to exclusion of employees from membership in the union be enlarged to include others who were in close relationship to the management or had some supervisory duties.

2. That the arbitration provision be changed so as to eliminate the provision that either party should have the right to a strike or a lockout in the event such party was dissatisfied with the arbitration award.

3. That the closed shop provision of the contract be eliminated.

4. That the seniority clause be revised to make it more flexible and workable.

5. That there be a classification of hotels in the city for the purpose of wage scale, such classification, however, not to affect present wages.

All of these requests were reasonable and legitimate subjects of negotiation.

The response to the involved hotels' suggested changes was a letter dated July 11, 1939 (Ex. 7) in which it was stated that the counter-proposals embodied therein were highly unacceptable and unsatisfactory. The letter was in the following tenor:

"* * * We regret to note that the tenor of such revisions evinces an anti-labor attitude on the part of your respective clients, and we can only say that in all probability this is a natural consequence of the recent anti-labor laws passed by the Wisconsin Legislature. * * *"

The letter further states:

"In view of the seeming impossibility to get together Local 122, Hotel & Restaurant Employees International Alliance of America, in accordance with Articles I and III, which provide there shall be no strike or lockout arising out of failure to negotiate a contract unless arbitration be had, the said Local 122 herewith demands arbitration affecting its contract, and herewith designates Phil L. Valley and I. E. Goldberg as its representatives on said arbitration board."

The letter also enclosed a proposed letter and the attorneys representing the involved unions stated that they proposed to send said letter to the National Letter Carriers Association unless a contract were executed by Saturday, July 15, 1939. The letter concludes:

"We hope that after due consideration your clients will think better of their position, and will enter into a contract with the unions, and not make necessary arbitration or the sending of the letter to the convention committee of the Letter Carriers' Association.".

The sample letter to be sent to the convention committee on July 15 (quite regardless of arbitration) accuses the involved hotels (faced with serious problems to arbitrate) as having taken an arbitrary anti-union attitude, blacklists the involved hotels, and requests the convention committee

to inform all its locals throughout the country to advise their delegates to refrain from making reservations at such hotels and also to advise cancellation of reservations already made.

3. The arbitration proceedings

The points of difference between the involved unions and the involved hotels were submitted to arbitration September 20, 1939 (Ex. 19), the intervening time apparently having been consumed in endeavoring to agree upon a fifth arbitrator, inability to agree thereon and finally the appointment of Alfred H. Handrich by the Wisconsin Employment Relations Board (Ex. 8, 19; Finding 10 of the Board, R. I 254).

The involved hotels submitted their differences with the involved unions to the board of arbitration and in a true spirit of arbitration. The unions did not. Ex. 19 (the arbitration proceedings) is an exhibit with respect to which we invite the court's most careful consideration*. It appears very clearly from the exhibit that the five matters heretofore mentioned which the hotels wanted embodied in a new contract were all matters of vital importance to them.

The Plankinton Hotel was the only one of the involved hotels that appeared to be making any money and it was making a very small return upon the capital invested. The Hotel Wisconsin Company had not made any money since 1931 (Ex. 19, page 51). The result of operations during the

*If there is any occasion in this case for this court's appraising the substantiality of the need for the challenged legislation (which there is not) the exhibit, as an object lesson in arrogance, speaks for itself.

preceding year was a net loss of $42,649. The operations for the current year (1939) were resulting in a worse loss than the preceding year. The operations in 1937, which was a very good year for hotels comparatively, resulted in a loss of over $6,000 for the Wisconsin Hotel Company. They had not made a profit for a period of seven or eight years (Ex. 19, page 52). The company owned two 99 year leases and the present rental payable under those leases was $20,000 a year. The owners of the ground had not received a cent of ground rent since 1933 because there wasn't any money available for that purpose. The company was in default to the extent of approximately $100,000 in taxes (Ex. 19, page 52).

Mr. Goldberg stated many times that the uniform hotel contract used in Milwaukee was the finest in the country (Ex. 19, page 54). Granted that to be true, its very excellence presented serious management problems to these hotels. The hotels were far from exhibiting an anti-union or unfair labor attitude in endeavoring to arrive at some solution of their problems.

The request that the article relating to the exclusion of employees from membership in the union be enlarged to include others who were in close relationship to management and who had supervisory duties, was a most reasonable request. The exclusion of the front office help from the contract at the Plankinton (persons very close to management) involved about 10 people (Ex. 19, page 62) out of a total of 188 (R. I 158). At the Medford Hotel, it involved 8 employees out of 121. The matter of clarifying that provision in the contract also involved honest operations by other hotels under the terms of their contracts

with the unions. This point appears very conclusively (Ex. 19, page 55 et seq.)

Ordinarily those in close relationship to management and having supervisory duties are not eligible for membership in a union of operation employees. It is difficult for such employees to serve two masters. When nationally organized unions seek to have company dominated unions disestablished, one of the points invariably pointed out to establish company domination is that of membership in the company union of employees who are close to management.

The unions' attitude upon this request was no different from that upon all of the other requests. Every request that the hotels endeavored to seriously arbitrate, the unions' attitude was one of adamant opposition thereto, a complete refusal to even listen to it and a threat to strike if the request was granted by the board of arbitrators. The arbitration was one of arbitrating with a shotgun and with the shotgun pointed at the fifth arbitrator.

There can be no real arbitration under such circumstances. Ex. 19 is a conclusive argument with respect to the reasonableness of point 2 which the hotels submitted to arbitration, namely, that of an arbitration clause which amounted to something and which would make the arbitration award binding upon the parties. It was calculated to make the arbitration clause amount to something other than waste motion and it was calculated to put the parties in a position where both would have to arbitrate upon the merits rather than by the shotgun process. This case itself demonstrates the reasonableness, not to mention the desirability of granting such request.

Point 3 involved elimination of the closed shop or all-union provision in the contract. The hotels took the posi-

tion that said clause was not in accordance with the spirit of Ch. 57, Laws of 1939 (the Employment Peace Act) and that they disliked compelling employees to join a union if the employees did not want to do so. This matter finally came down to a point where the involved hotels signified their willingness to having a closed shop provision in the contract provided the employees wanted a closed shop provision and voted therefor at an election to be conducted by the Wisconsin Employment Relations Board. The attitude of the involved hotels was a most reasonable one and in accordance with existing law (Ex. 19, page 71 et seq.).

The 4th point submitted to arbitration, namely, a requested revision of the seniority clause so as to make it more flexible and workable, does not appear to have been unreasonable. The reasons therefore are stated at page 70 of Ex. 19. The seniority clause is a most troublesome clause in any union contract with employers. There necessarily has to be some flexibility in it. The seniority rule in state or national service, while a desirable rule, if rigid and unflexible, will often mean that the incompetent and unadaptable are filling jobs that the competent and adaptable should fill. The seniority rule, while undoubtedly desirable in any union contract, does make for round pegs in square holes and without considerable flexibility makes for inefficiency and serious management or administrative problems.

The argument for the classification of hotels (the fifth point submitted by the hotels for arbitration) is presented on page 64 of Ex. 19. No one could say that the request was an unreasonable request. With respect to hotels operating at losses or upon an extremely small margin of profit,

it would seem that the request was a necessary one if the hotels were to survive.

4. The arbitration award

On October 30, 1939, the board of arbitration issued its award, the two members appointed by the involved unions dissenting (Ex. 9). The award in general granted all of the union requests for revision (none of the requests had been opposed by the involved hotels). The only provision granted in the award which had been urged by the hotels was a provision that a closed shop was to be effective only upon the condition that the employees of the respective hotels involved, by a secret ballot conducted under the supervision of the Wisconsin Employment Relations Board, voted in favor of a closed shop by a 75 per cent majority. This provision conformed to the provisions of sec. 111.06 (1) (c) regarding all-union contracts. On November 1, the Company notified the unions' attorney, Mr. Goldberg, of its acceptance of the arbitration award and that it was ready to enter into a contract in accordance with the provisions thereof (Ex. 10, Finding 13 of the Board; R. I 256).

The sole cause of the strike was the refusal of the unions to permit the employees of the company to have anything to say about whether the new contract should contain an all-union agreement clause. The sole object of the strike was to compel the company to enter contractual relations with the unions containing an all-union agree-

ment clause and without such vote and contrary to the arbitration award*.

5. The strike—it was set in a contemporaneous background of violence, force, fear, intimidation and coercion, led by and engaged in by the responsible officers of the unions in charge of the strike

At about four o'clock on November 2, 1939, the business manager of Local 122, Phil L. Valley, "pulled" the strike (R. I 84, 85) and ordered all employees in every department of the Plankinton House and Kilbourn Hotel to cease work. A picket line of 75 or 80 pickets was thrown about all the entrances to the hotels and the pickets continued to parade before the entrances at the time of the hearing before the board (R. I 85).

Prior to the calling of the strike, the employees of the Plankinton House Company did not vote by secret ballot to call such strike. (Finding 15 of the Board, R. I 256, 82). The strike was called at a time when the hotel was full of school teachers who were in Milwaukee for the teachers' convention (R. I 155),—a time calculated to cause just as much harm and injury to the hotels as the unions could cause and to cause as much inconvenience to the public as could be caused.

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*The strike severed contractual relations. The petitioners contended otherwise in the Circuit Court. That Court ruled that the strike did sever contractual relations (R. I 26-31). Upon this point the unions on appeal to the Supreme Court abandoned the position taken in the Circuit Court,—did not assign the Circuit Court's ruling in this regard as error. The question is therefore res judicata. The strike was therefore to compel the company to violate the law, namely that of entering into a contract containing an all-union agreement clause without submitting such question to the employees in a secret referendum ballot conducted by the Board and contrary to the provisions of sec. 111.06 (1) (c) and (e).

The picketing was characterized by booing, hissing, sneering and hooting at guests (R. I 158). The manager of the hotel was spit upon one night (R. I 158). On at least one occasion the pickets carried clubs in their hands in front of the hotel (R. I 158). The campaign was characterized by threats of physical violence directed at the employees, by spitting upon them and by calling them vile names (R. I 101, 104, 136, 139, 140, 141, 142, 145, 146, 148).

Numerous inexcusable assaults and batteries occurred and many of them were committed by responsible officers of the union and those actively in charge of the picketing. The pickets by force attempted to prevent the delivery of products and commodities to the hotel. Violence was implemented by resort to secondary boycott. In numerous instances the union provided bail, provided counsel and paid the fines of those arrested for assaults. All of the matters referred to in this paragraph appear from the findings of the board (not challenged in the State Supreme Court and not open to challenge here) nor are they denied in the record. For convenient reference to the violent and inexcusable conduct and the details connected therewith, we set forth the findings of the board on these matters, as well as citations to the pages of the record where the details may be found (Findings of the Board, R. I 257 et seq.).

> "Phil L. Valley is business manager of Hotel and Restaurant Employees International Alliance, Local No. 122, and as such business manager, notified Marquette University and the Milwaukee School of Engineering, directing that all students working at the Plankinton House for their meals be ordered to immediately discontinue such work, and that unless such

students did discontinue work at the Plankinton House, that the union would be forced to stop the employment of university students working at other hotels and restaurants in the City of Milwaukee which had collective bargaining contracts with Local No. 122" (Finding 17, R. I 114-121).

The result of these demands was that the students of these two educational institutions were forced to quit work for the Plankinton House Company. Rather than jeopardize the jobs of their students working in other hotels and restaurants in the city, the school authorities reluctantly intervened.

"On November 4, 1939, union pickets, by means of force, prevented delivery to the Plankinton House of floral decorations by one Joseph Mueller, an employe of August F. Kellner Company. That as a result of the altercation at said time, Jack Heisdorf, vice-president of Local No. 122, Hotel and Restaurant Employees International Alliance, and Charles McLaughlin, assistant to the secretary of Local No. 122, were arrested, and on November 17, 1939, convicted of assault and battery, McLaughlin being fined ten dollars and costs, and Heisdorf being fined five dollars and costs, the sentence against Heisdorf being suspended and he was placed on probation for thirty days. That Local No. 122 provided counsel and bail for both Heisdorf and McLaughlin and paid McLaughlin's fine" (Finding 19, R. I 102-104, 194).

Heisdorf was not only vice-president, he was also assistant business manager and he was also in charge of the pickets at the hotels (R. I 85) and had control of them (R. I 92).

Charles McLaughlin was not only assistant secretary of Local 122; he was also a captain of pickets (R. I 218). There were about fifteen pickets present at the time Mueller attempted the delivery (R. I 102, R. II 20). The pickets had told Mueller he shouldn't make the delivery because there was a dispute with the boss. Mueller called his employer and was told to go ahead and make the delivery (R. I 103). The policemen formed a line and Mueller was supposed to walk in back of it. Nevertheless McLaughlin and Heisdorf each took a swing at him and destroyed the floral decorations he was carrying (R. II 20)*.

William Komes, head waiter at the Plankinton Hotel, had been asked to unlock the door so that delivery might be made (R. I 100). When he unlocked the door five or six men ran across the street to where he was standing. When he tried to open the door to let one of the men in who was going to do the decorating, the door was shoved in his face (R. I 100-103). Komes fell back against the screen and knocked it over. When he attempted to open the door the pickets called him a "scab" and everything like that (R. I 101). Pickets on other occasions threatened Komes, called him a "scab" and said that he had better look out or they would "get him" (R. I 101).

Peggy Hehmeyer, head waitress and banquet manager of the hotel, on this same occasion was told by a picket that he would "get" her or that she would not get another job (R. I 104).

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*The petitioners (B. p. 47) assert that these arrests and convictions and the others referred to in the findings were civil proceedings for the purpose of collecting a penalty for violation of city ordinances. The record does not substantiate such assertion.

"Charles McLaughlin returned to the picket line immediately after his arrest, and on November 17, 1939, assaulted one Lester Raasch, an employe of the Plankinton House, was again arrested, convicted, and fined twenty-five dollars and costs, and the union again provided him with counsel and paid such fine" (Finding 20, R. I 91, 137, 195).

This was on an occasion when Raasch was attempting to carry salt into the hotel (R. I 137). Delivery was attempted of some five or six bags of salt of about 100 pounds each. Raasch started carrying one of the bags. The women pickets in the line started crowding around him and pulling at the salt and calling for help. Before he got half way to the door Charles McLaughlin and several other men came running at Raasch. McLaughlin started hitting him with his fists. Raasch was struck three or four times in the face (R. I 137). When the policemen grabbed McLaughlin and told him he couldn't do that, McLaughlin's response was that Raasch couldn't get the bag of salt in there either (R. I 137).

"On November 4, 1939, two salesmen representing the Automotive Electrical Association, who were attempting to deliver displays and samples to the Plankinton House, were, by means of force, prohibited from making the delivery by Phil L. Valley and a number of pickets" (Finding 21, R. I 139, 140).

Phil L. Valley was the business manager of Local 122 (R. I 83). Not only was the delivery prevented but it was stated by Heisdorf, vice-president of the Union (R. I 85) that the doors might as well be locked and barred because

nothing was going to get in or out of the building (R. I 140).

There were about ten pickets there at the time this delivery was prevented. Two salesmen who drove up wanted to unload their samples and displays. Valley told them they had no right to bring the stuff in because there was a picket line and nothing was supposed to be brought into the building. An officer present told them they had the right to bring it in. Weber, a steward at the Plankinton House, asked the men to let him have the packages. Valley turned and pushed his hand away, stared at him for a moment, took off his glasses and said, "If you fellows want to get tough, we'll get tougher."* (R. I 139, 140)

> "On November 10, 1939, Jack Heisdorf, Charles Alden, striking employe of the Plankinton House, and other pickets, by the use of force, prevented delivery of ice cubes to the Plankinton House; and in the course of the attempted delivery, Charles Alden assaulted Robert Jeske, then an employe of the Plankinton House" (Finding 22, R. I 104, 112, 113, 125, 126).

This was an occasion when the company was trying to get into the hotel five or six galvanized cans containing ice cubes. The cans were about four feet high and twenty-seven or twenty-eight inches in circumference (R. I 104). The hotel employees were endeavoring to take the cans from the rear compartment of a car and carry them into the hotel (R. I 105). Alden got Jeske around the neck and struck him three or four times in the face with his clenched fist (R. I 104-112, 113, 125, 126, 156). Heisdorf, in conjunc-

*There is no evidence at all that anyone was getting "tough". The steward was simply trying to effect delivery.

tion with other pickets, kept grabbing the cans away from the employees and tipped them over. Heisdorf, vice-president, assistant business manager and in charge of and in control of the pickets (R. I 85, 92), was the ringleader (R. I 105, 112, 113, 125, 126, 156). The company was successful in effecting delivery of one can only. All the others were tipped into the street and left there (R. I 105). The scene was a mob scene. Heisdorf told one of the employees that he thought he was going to stay home and that he had better stay in the hotel (R. I 125).

> "On November 17, 1939, Paul Zeibell, an employee of the Plankinton House, was assaulted by James O'Brien, a picket employed by the union, and stationed on the picket line at the Plankinton House. O'Brien was arrested, convicted and fined five dollars and costs" (Finding 23; R. I 132-136).

Zeibell was a bellboy (R. I 132). On the morning in question Zeibell had been asked by a guest to take two sample cases from the guest's room to a taxi (R. I 102). Zeibell stood in the vestibule with the cases while the guest telephoned to determine the fare to the express office. O'Brien was in the picket line and began making nasty remarks, as he always did, calling Zeibell all kinds of vile names. O'Brien was parading with the pickets directly in front of the hotel. After calling Zeibell these names, as O'Brien approached the entrance in his march, he looked around, handed his sign to the picket in front of him, stepped out of line and without warning struck Zeibell a blow on the right side of his neck with his clenched fist (R. I 132-133, 134, 136, 195). The names called were vile to an extreme degree (R. I 132). O'Brien was an ex-prize

fighter, a former member of Local 122, but not at the time of these occurrences (R. I 88). The union paid him for his picketing (R. I 218).*

> "On November 14, 1939, Edward Knopf, an employe of the Plankinton House, was assaulted by John Thomas O'Maher, a picket stationed by the union at the Plankinton House, and a striking employe of the Plankinton House" (Finding 24; R. I 145).

Local 122 provided bail, counsel, and paid the fine (R. I 89). Knopf intended to take his car and drive another bellboy to see his mother. As he stepped out on the street to get his car, O'Maher kicked him in the back of the knees (R. I 145, 195). A few days later Knopf saw O'Maher again and O'Maher told him to come outside and he would take care of him. He said he wanted to get hold of him and raised his fist (R. I 145).

> "On November 17, 1939, Rudolph Stano, an employe of the Plankinton House, was assaulted by Joseph Hofich, a picket stationed at the Plankinton House by the union, and Hofich was arrested, convicted, and fined five dollars and costs" (Finding 25, R. I 149).

This assault arose out of an occasion when a guest had asked Stano, a bellboy, to take a picture to a car which the guest had parked in front of the hotel in the loading zone (R. I 149). As Stano finished putting the picture in the car, Hofich jumped on Stano's back and started slugging him with his clenched fist. Stano had said nothing to

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*O'Brien was the only one involved in any of these acts of violence who was not a member in good standing of the involved unions. All of the pickets were paid an hourly wage by Local 122 (R. I 88, 218).

Hofich or to any of the pickets (R. I 150). Hofich jumped out of the picket line without any warning, jumped on Stano's back and commenced to assault him (R. I 196). Hofich was a captain of pickets (R. I 89). He supervised the pickets (R. I 87) and was still doing duty as such at the time of the hearing before the board (R. II 19). The union provided bail and counsel (R. I 89).

> "On November 17, 1939, Thomas James, an employe of the Plankinton House was assaulted by Larry McAllen, a picket stationed at the hotel by the union, and said Larry McAllen was thereafter arrested, convicted and fined five dollars and costs" (Amended Finding 26, R. I 143-144).

James was a laundryman at the hotel. Between 3:30 and 4:00 o'clock on the day in question he left the hotel to go to the hospital to see his wife. McAllen, a picket, came up from behind, grabbed him, put him down on the sidewalk and started hitting him on the jaw. He pinned James' arms down with his knee so that he couldn't move and proceeded to kick and strike until a horse mounted policeman interceded (R. I 143-196). James had to see a doctor and have x-rays taken of his injuries. His jaw was badly bruised and he was still under a doctor's care at the time of the hearing before the board (R. I 143). O'Brien, named in Finding 23, and Larry McAllen were represented in court by the attorneys for the unions. (R. 88, 89). These attorneys represented all the pickets in court who were arrested and charged with violence (R. I 88, 89).

> "Throughout the strike, the City of Milwaukee caused to be stationed at the Plankinton House throughout the twenty-four hours of each day, six police offi-

cers for the purpose of maintaining order" (Finding 27, R. I 197).

In spite of such police supervision these assaults occurred (R. II 32).

Ward Whitney, a bus boy at the hotel, on November 18, when leaving the hotel around 4:30 o'clock in the afternoon, and while on the sidewalk in front of a tavern next to the hotel, was accosted by a picket who jumped on his back and said, "So you work at a scab hotel do you?" Whitney said nothing. The picket struck him several blows. A policeman came and the picket escaped by running up an alley (R. I 150-151, 152). Whitney took a car home and after leaving the car and while walking home he met two fellows. He was asked if he still worked at the hotel. Upon his response that he did, he was told, "Now you're going to get it." One of the fellows doubled his fist and hit Whitney with his clenched fist four or five times on his face and chest (R. I 151, 152, 153) and the other fellow jumped on his back. Whitney knocked one fellow down and succeeded in throwing the other fellow on the sidewalk. He then ran home.

Fr l Langdon, a valet at the Plankinton House, on November 11, 1939, stopped in at a tavern next door for a couple of glasses of beer. Two fellows came over to him and told him that they understood he was working at the laundry. He told them he wasn't. The other fellow started to talk to him and when Langdon turned to talk to the second man who engaged him in conversation, the first slugged him and hit him on the chin and on the back. When Langdon turned toward his first assailant the other fellow then slugged him on the other side of the face. Langdon

was told to let that be a lesson to him. The men then left by the back door (R. I 148). Langdon was a cripple, having a stiff left arm which he could raise but which he could not bend at the elbow. He did not strike back (R. I. 149).

On November 5, Harvey Weber and another employee tried to make a delivery of clean wash by automobile from the Plankinton Hotel to the Kilbourn Hotel. There were only two pickets at the door at the time. As he walked outside four, five or six men came across the street, got into the picket line and started parading around in line so that it was impossible to drive a car up to them. The management decided not to attempt the delivery (R. I 142). Charles McLaughlin jumped upon the stoop and hollered at James Myrick, told him he was a "dirty rat" and a "scab" and stated, "We'll get you later." (R. I 139, 142) There were ten or twelve pickets there at the time (R. I 139).

On November 13, a junk dealer came to the hotel to carry away some bales of waste paper (R. I 140). Charles McLaughlin talked to the driver for ten or fifteen minutes. The driver then said that he wouldn't haul the paper away because he didn't want to get into trouble. McLaughlin hollered vile statements and names at Harvey Weber, steward at the hotel, who had brought up the bales of waste paper for loading (R. I 140).

James O'Brien (named in Finding 23) on November 16, while on picket duty, spit upon Lester Raasch, a bellboy while he was holding the doors open for some engineers to enter the hotel (R. I 135, 136). This same O'Brien had previously told Raasch that if he came outside he would beat him up (R. I 136).

On November 6, O'Brien spit in the face of James Myrick while he was holding the door open for some Purdue University engineering students to enter (R. I 141). The pickets tried to prevent Myrick from entering the Plankinton street entrance to the hotel (R. I 142). One or two of them offered to fight with him a couple of times. Myrick did not respond (R. I 142).

On November 9th, Elmer Hunt, supervisor of the Plankinton Hotel parking lot, passed Thomas O'Maher and said "hello" to him. The response was a vile insult directed at him (R. I 146).

The pickets called, hissed and sneered at guests all day and all night to an extent that it could be heard from inside offices of the hotel (R. I 158). They ate peanuts and threw the shells at the entrance. Guests complained. When the hotel cleaned the entrance the same thing would occur right over again. It was a hopeless task, keeping the entrances clean (R. I 158). Guests and the Chamber of Commerce complained to the police with respect to the booing (R. I 196-197).

On November 13, 1939, Mr. Goldberg, one of the attorneys for the unions endeavored to get the Business Institute of Milwaukee, occupying some nine rooms of space in the hotel, to break its lease with the hotel (R. I 121, 122). Goldberg advised that students of this institution, members of the office workers' union, *could not go through the picket line* (R. I 121, 122, 123); that there was not a court in town that would sustain the hotel if the institute broke its lease under the conditions (R. I 122) as the students could not get into class because of the strike (R. I 123). Following this conversation the president of the institute,

teachers and students were all booed and hissed by the pickets and a lot of nasty remarks made to them (R. I 123-124).

On November 11, 1939, after the strike had been in progress for some nine days, the unions' effort to adjust is evidenced by the business manager's letter of November 11 (Ex. 12) in which demand was made (1) that the Company execute the same supplemental agreement which the other hotels had agreed to and (2) that the Company give all employees in Local 122 a uniform 10 per cent raise over and above what any other hotel in Milwaukee was paying.

On November 28, 1939, the union wrote the Plankinton House Company that under the terms of the contract they could hire no new employees except from the union and that the employees so hired would refuse to work (Ex. 13).

About two weeks before December 11, 1939, shingle nails were spread about the parking lot on several occasions and after pickets, ranging to ten in number, were standing near said lot (R. I 146-147, Ex. 20)*.

On November 19 a stench bomb was found in the hotel. The liquid had been generously distributed along about thirty feet of the hallway immediately adjacent to some of the dining rooms (R. I 156, 157). For two or three days following the odor that penetrated from the acid was such that quite a few of the students attending the business institute were nauseated and had to go home (R. I 122).

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*The petitioners complain that they were not definitely connected with this and the occurrences mentioned in the two paragraphs following. Be that as it may, both the Circuit Court and the Supreme Court clearly had a right to consider such occurrences in determining whether the order of the board was properly adjusted to the concrete factual situation presented to the board. Milk Wagon Drivers Union of Chicago, Local 753, et al., v. Meadowmoor Dairies, Inc. 312 U. S. 287, 61 S. Ct. 552, 85 L. ed. 497 (Adv. Op., 1941).

The odor was still present in the hotel at the time of the hearing before the board. (R. I 157). Following this occurrence, the company felt obliged to hire private help to protect its property (R. I 205).

On November 26, 1939 the rear elevator window on the main floor was broken by a large stone having been thrown through it (R. I 157, Ex. 22 and 23).

6. The formation and recognition of the Independent Organization of Plankinton House Company employees

148 out of 188 former employees had returned to work and were employees of the company at the time of the hearing before the board (R. I 158).

Following the strike the company employees formed an independent union known as the Independent Organization of the Plankinton House Company Employees (R. I 81, R. II 21-32). The first organization meeting was on November 21. Approximately a week thereafter the union claimed to have a majority of the employees (R. II 25). The union demanded that the company recognize it as the bargaining representative and presented proof that it did represent the majority of employees (R. II 25, 26, 27). On December 1, 1939 the company recognized the union as the voluntary bargaining agent (R. II 25).

This union intervened in the unfair labor practice hearing before the board and petitioned the board to hold an election to determine its bargaining status, pursuant to the provisions of sec. 111.05, Stats. (R. I 81, 82). The union was permitted to intervene and the representation petition was heard as a part of and at the same time as the

hearing upon the company's charge of unfair labor practices. The board ordered an election (R. II 39). The election was conducted by the board and resulted in 134 votes in favor of the Independent and four votes against (R. II 39). The board, on March 6, 1940 accordingly certified the Independent as the exclusive bargaining representative (R. II 39-40). The unions petitioned for review of these representation proceedings pursuant to the provisions of sec. 111.05 (3), Stats.*

This review proceeding came on for hearing before the circuit court for Milwaukee county, together with the hearing upon petition for review of the board's order in the unfair labor practice case. The court confirmed and approved (R. II 47, R. I 45, 47).

ISSUES PRESENTED BY THIS REVIEW —DISPOSITION OF SUCH ISSUES BY THE COURT BELOW

1. Does sec. 111.06 (2) (e) of the Employment Peace Act, as construed by the Supreme Court of the State of Wisconsin and when read in the light of other provisions of the act, violate the 14th amendment to the Constitution of the United States; either as to (a) depriving the petitioners of freedom of speech or (b) denying them the equal protection of the laws?

2. Does the order deprive the petitioners from exercising the constitutional right of freedom of speech, press

*Sec. 111.05 (3), insofar as material, provides:

"The board's certification of the results of any election shall be conclusive as to the findings included therein unless reviewed in the same manner as provided by subsection (8) of section 111.07 for review of orders of the board."

and assemblage under the 14th amendment to the constitution of the United States?

As will be seen from examination of the petition for review (R. I 2-6) and the able and exhaustive decision of the Circuit Court (R. I 12-47), the petitioners raised many legal questions, constitutional and otherwise, in the Circuit Court. Upon appeal to the Supreme Court, the petitioners abandoned all questions presented to the Circuit Court except the constitutionality of sec. 111.06 (2) (e) under the 14th amendment (1) because the statute deprived them of freedom of speech and (2) because it denied them the equal protection of the laws and (3) the further point that the order deprived the petitioners of the constitutional right of freedom of speech under the 14th amendment. Error was assigned in the supreme court as set forth below.*

The act as a whole was not challenged. This is specifically pointed out several times by the Supreme Court in its opinion (R. II 53, 70-71). The act as a whole (not the constitutionality of it) was before the Supreme Court of the state and is before this Court only because all relevant sections of the act must be considered and given their full force and effect in determining whether sec. 111.06 (2) (e)

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*(1) The Circuit Court for Milwaukee County erred in affirming that order of the Wisconsin Employment Relations Board requiring the appellant Unions, their officers, members, agents, successors and assigns, to cease and desist from engaging in promoting or inducing picketing at or near the Plankinton House or Kilbourn Hotel and from boycotting in any way the Plankinton House for the reason that:

(a) Section 111.06 (2) (e), upon which such order is based, is unconstitutional, void and of no effect whatsoever, being contrary to the Fourteenth Amendment to the Constitution of the United States and Article I of the Constitution of the State of Wisconsin.

(b) Such order deprives the Unions, their officers, members and agents from exercising the constitutional rights of freedom of speech, press and assemblage, guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I of the Constitution of the State of Wisconsin.

of the act, as construed by the Supreme Court of the state of Wisconsin is violative of the 14th amendment for the reasons assigned by petitioners.

The Supreme Court in substance construed the terms used in sec. 111.06 (2) (e) to comprehend only violent, intimidating or coercive picketing, boycotting and other overt concomitants of a strike by persons acting in concert; decided that these terms, as used in said section, could not be construed to deny a minority the right to picket peacefully or exercise the right of freedom of speech; that sec. 111.15 of the statutes forbade any such construction and any such application of the section; that the section was not violative of the 14th amendment as denying the equal protection of the laws and that the order of the board in the light of the factual situation did not deprive the petitioners of any constitutional right of freedom of speech under the 14th amendment.

SUMMARY OF ARGUMENT

POINT I.

SEC. 111.06 (2) (e) OF THE ACT, AS CONSTRUED BY THE STATE SUPREME COURT AND READ IN THE LIGHT OF ALL RELEVANT PROVISIONS IS NOT VIOLATIVE OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AS DEPRIVING THE PETITIONERS OR ANY MINORITY OF THE EXERCISE OF THE RIGHT OF FREEDOM OF SPEECH.

The petitioners' entire argument against the validity of sec. 111.06 (2) (e) is grounded upon a construction of that section repudiated by the State Supreme Court, —a construction which that Court says the statute will not bear. Petitioners' real quarrel with the decisions under review is a quarrel with the Supreme Court's construction of the statute. This raises no federal question. The construction of the statute by the Supreme Court of the State is as much a part of the statute as if the words were expressly written therein. That construction is not assailable here.

The Wisconsin Supreme Court in substance construed sec. 111.06 (2) (e) and the terms used therein to comprehend only violent, intimidating or coercive picketing, boycotting and other overt concomitants of a strike by persons acting in concert; decided that said section, when read in the light of sec. 111.15, could not be construed to deny a minority the right to peacefully picket or exercise the right of freedom of speech and that sec. 111.15 forbade any such construction.

The challenged section as construed does not deprive petitioners or minorities of freedom of speech

guaranteed by the 14th amendment as it regulates only conduct which falls outside of that area.

The petitioners not only misconstrue the challenged section but the argument made against the constitutionality thereof, however construed, is such an all-out argument for freedom of speech as an absolute right as to leave the legislatures of the several states completely powerless to cope with the problem of concert of action directed at the infliction of intentional injury upon another, either with respect to unlawful object or unlawful means, if speech is an implementing or an enmeshed medium by which the unlawful object is sought to be reached or by which the unlawful means are made effective. The principles for which petitioners contend are so utterly vicious as to destroy any society which harbors them. The cases cited to support the argument, such as the *Thornhill*, *Carlson*, *Swing*, etc., cases, are not of any such far reaching import.

Because of the construction placed upon the challenged section by the Supreme Court of Wisconsin there is no occasion for this Court to appraise the substantiality of the need for it but even if there is such occasion, it is manifest that there was and is a substantial need because of (1) the power given to labor under prior state legislation, (2) the abuse of this power by labor, (3) the bitter struggle then and now being waged within the ranks of organized labor,—the AFL-CIO conflict, (4) problems which arose out of new acts beneficial to organized labor such as the National Labor Relations Act and the State counterpart thereof, and (5) facts known to all with respect to the functioning of organized labor including peaceful picketing used as an instrument to perfect and maintain a boycott.

For like reason there is no occasion for this Court to consider the Act as a whole for the purpose of examining the extent to which the Act manifests regard for the balancing of rights of all major interests but even if there is such occasion, it is apparent from an analysis of the Act that it does show a scrupulous legislative regard for the balancing of rights of all major interests. Regulation of the right of freedom of speech may be sustained in an act which does manifest care for the balancing of major interests where such regulation could not be sustained in an act which does not manifest such care. If the challenged section, as construed, touches even incidentally the area of exercise of the right of freedom of speech, any conceivable regulation involved in that area is of insignificant import when compared to the regulation sustained by this Court in the field of freedom of religious worship in *Minersville School District et al v. Gobitis*, 310 U. S. 586, 60 S. Ct. 1010, 84 L. ed. 1375. If there is any conceivable clash in the case at bar with the exercise of freedom of speech, it must be that of a clash between the power of the State to control violent, intimidating or coercive means as opposed to freedom of speech absorbing such power.

The Employment Peace Act is designed to meet many of the problems which arose under prior State laws as well as problems which arose out of the Congress enacting the National Labor Relations Act. The entire Act, except with respect to regulation of use of the all-union agreement, is grounded upon the principle of majority rule in an appropriate collective bargaining unit which is the foundation and cornerstone upon which the structure of the principle of collective bargaining is erected. Collective bargaining units are made elastic and are determined by the affected employees

themselves. The Act is much more carefully drawn to protect the rights of minorities in selecting their own units and to protect minority collective bargaining than is the National Act. The Act fosters and protects the right of labor to bargain collectively free from employer dominance and coercion just as completely as does the National Act.

The challenged section is not violative of the 14th amendment because of a threat or a fear of subsequent punishment with respect to the exercise of the right of free speech. The section can be no more subject to constitutional attack in this respect than the National Labor Relations Act.

POINT II.

SEC. 111.06 (2) (e) IS NOT VIOLATIVE OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AS DENYING TO PETITIONERS THE EQUAL PROTECTION OF THE LAWS.

Peititoners' argument against the constitutionality of the classification strikes at the very principle upon which the whole structure of collective bargaining is rested. The argument against the constitutionality of the classification is in essence that majority rule within an appropriate collective bargaining unit is constitutional classification for purposes of conferring benefits upon labor but that it is unconstitutional classification for purposes of making labor accept some responsibility in relation to the benefits conferred. It is grounded upon repudiation of all responsibilities that go with acts which recognize the principle of collective bargaining and seek to foster and protect it.

The majority in a collective bargaining unit does not determine whether a minority may exercise the right of freedom of speech. What the majority does do is to determine whether the conditions that prevail in their employment are such that coercive instrumentalities directed at injury of another by concert of action ought or ought not to be used to remedy them, whether the conditions that prevail are such as to justify such intentional injury and consequent injury of the affected employees. This determination is made upon the basis of the self interest of the affected employees,—the only practicable method whereby the legislature can determine such question. A determination of that question has nothing to do with the exercise of freedom of speech. It does have something to do with unjustifiable injury of another by combinations by use of coercion and the infliction of intentional injury by such use.

The classification is entirely similar to that of the National Labor Relations Act.

POINT III

THE ORDER OF THE BOARD, SUSTAINED AND ENFORCED BY THE COURTS OF THE STATE, DOES NOT INVADE PETITIONERS' CONSTITUTIONAL RIGHT OF FREEDOM OF SPEECH UNDER THE 14TH AMENDMENT.

The picketing *at or near* the hotels was set in a background of violence, force, fear, intimidation and coercion, all directed by and engaged in by the responsible officers of the petitioning unions in active charge of the campaign. The campaign was that of a continuously coercive thrust. It was continuously threatening, intimidating and coercive. It was aimed at and calculated to engender fears and to compel action in accordance with fears engendered. The case is ruled by the *Meadowmoor case*. Any peaceful picketing that there may have been in the case at bar was much more *enmeshed* with a campaign of violence, intimidation and coercion than was the picketing in the *Meadowmoor case*.

The order was narrowly adjusted to the factual situation presented to the board and dealt with by the courts of the State. The petitioners were not prohibited from picketing any place except *at or near* the hotels,—the place where the violent, intimidating and coercive campaign had been and was being waged.

The order is more narrowly drawn and adjusted to the factual situation dealt with than was the injunction in the *Meadowmoor case*. It is far less subject to misconstruction than was the injunction in that case. It does not prohibit advertising the facts of a labor dispute by any means whatsoever or at any place whatsoever except by use of picketing *at or near* the hotels. Petitioners' argument to the contrary is an insidious one

and seeks to place an organized boycott by combinations upon the same constitutional plane as picketing. The common denominator of any boycott is that of agreement by concert of action to withhold patronage or labor, or to refuse to perform services or purchase a product or products. An organized boycott cannot be discussed except in terms of use of intimidating or coercive means. The agreement by concert, which is the common demoninator of any boycott, is in no sense an exercise of the constitutional right of freedom of speech. Boycotting does not have its roots in the constitution as an exercise of the constitutional right of freedom of speech.

In sustaining the order of the board the courts of the State anticipated correctly this Court's holding in the *Meadowmoor case*. So did the board—but whether it did or did not is immaterial.

The trial Court's temporary stay order pending appeal to the Supreme Court of the State in no sense determined that it was unnecessary to prohibit picketing as prescribed by the order to eliminate from the case the coercive effect of past conduct or that similar conduct was not likely to be engaged in by petitioners at any propitious opportunity. At the time the stay was granted a stay pending appeal appeared to be a matter of right under Wisconsin law provided the appellants furnished bond as prescribed by the trial Court.

Both the trial Court and the Supreme Court grounded the validity of the order in question upon the violent, intimidating and coercive conduct which characterized the campaign as continuously threatening and coercive far more than did the Supreme Court of Illinois in the *Meadowmoor case*.

Even if the case at bar is not ruled by the *Meadowmoor case* the order of the board nevertheless is not violative of petitioners' right to freedom of speech under the 14th amendment as the picketing was directed to an unlawful object.

ARGUMENT

POINT I

SEC. 111.06 (2) (e) OF THE ACT, AS CONSTRUED BY THE STATE SUPREME COURT AND READ IN THE LIGHT OF ALL RELEVANT PROVISIONS IS NOT VIOLATIVE OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AS DEPRIVING THE PETITIONERS OR ANY MINORITY OF THE EXERCISE OF THE RIGHT OF FREEDOM OF SPEECH.

A. The petitioners' entire argument against the validity of sec. 111.06 (2) (e) is grounded upon a construction of that section repudiated by the State Supreme Court, —a construction which that Court says the statute will not bear.

Most of petitioners' argument is entirely beside the point in this Court because of the construction placed upon sec. 111.06 (2) (e) by the Supreme Court of the State. The arguments advanced by the petitioners in their brief were apropos when addressed to the State Supreme Court and before that Court had construed the challenged section. They are not apropos here.

Sec. 111.06 (2) (e), the challenged section, provides that it shall be an unfair labor practice

"To cooperate in engaging in, promoting or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employes of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike."

Sec. 111.15 of the act provides:

"Except as specifically provided in this chapter, nothing therein shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work; nor shall anything in this chapter be so construed as to invade unlawfully the right to freedom of speech. And nothing in this chapter shall be so construed or applied as to deprive any employe of any unemployment benefit which he might otherwise be entitled to receive under chapter 108 of the statutes."

The petitioners took the position in the State Supreme Court, and still take the position here, that the challenged section, sec. 111.06 (2) (e), must be read in complete disassociation from all other provisions of the act; that in spite of the express mandate of sec. 111.15 of the Act and in complete disregard thereof, the challenged section *must be construed* so as to deprive them and minorities of exercise of the right of freedom of speech guaranteed by the 14th amendment.

The Wisconsin Supreme Court, both in the original opinion and in the opinion upon motion for rehearing, expressly repudiated any such construction of the challenged

section. The Supreme Court held in substance* that the terms used in sec. 111.06 (2) (e) comprehended only violent, intimidating, or coercive picketing, boycotting and other overt concomitants of a strike by persons acting in concert; that these terms, as used in said section, could not be construed to deny to a minority the right to peacefully picket or exercise the right of freedom of speech and that sec. 111.15 of the statutes forbade any such construction.

After filing of the original opinion and on motion for rehearing, the petitioners still continued to misconstrue the challenged section and to argue deprivation of constitutional rights based upon such misconstruction. This appears very clearly from the court's opinion upon motion for rehearing from which we quote:

> "Rosenberry, C. J. (*on motion for rehearing*). On this motion appellants open their argument with the following statement:
>
> "'Since receipt of the supreme court's decision we have gone over it carefully and searchingly in order that we might have a clear and precise understanding of the basis for such decision.
>
> "'Only one thing was clear. That was that the Wisconsin supreme court, traditionally liberal and traditionally alert to protect the civil liberties of the citizens of this state, had placed its stamp of approval upon a statute, and an order based thereon, prohibiting minority groups from engaging in those rights guaranteed by the constitution of the United States. This for the sole reason that they were minority groups.'

*The supreme court opinions are analyzed in this brief, pp. 46-51.

"* * * It is almost futile to attempt to reply to a contention of this kind in the face of the provisions of the statute and the explicit language of the opinion. Counsel continue to misinterpret the statute and, as a consequence, misunderstand the opinion." (p. 352)* (R. II 69)

"* * * We pointed out—

"'In this case it is undisputed that numerous assaults were committed by pickets; that the pickets acted in concert; that the fines of these pickets were paid by the unions; that ingress and egress to and from the premises of the employer were prevented by force and arms. It was at conduct of that kind that the statute was aimed. It is conduct of that kind that is dealt with in this case. It is conduct of that kind that is declared to be an unfair labor practice by the statute, and from which the defendants are ordered to cease and desist. The statute does not even declare conduct of that kind to be unlawful, nor does it subject the offender to a criminal prosecution.'

"How this can be tortured into a statement that minority groups are, by the order affirmed in this case, prohibited from peaceful picketing as described in the *Thornhill case*, is beyond our understanding. Under the statute and the order of the board as interpreted and construed by the explicit language of the opinion, freedom of speech and the right peacefully to picket is in no way interefered with. * * *" (p. 353) (R II 70).

"* * * We did not attempt, because it was not involved in this case, to distinguish between what a majority group may do in carrying on a strike from what the minority group may do. We pointed out that the

*Refers to page of official Wisconsin Reports

statute nowhere prohibited employees from withdrawing from their employment either singly or in groups and certainly it in no way interferes with the right of free speech. Par. (e), as construed, does not prohibit, as described in the *Thornhill case*, peaceful picketing. * * *" (p. 353-354). (R. II 71).

"* * * The picketing carried on in this case was not peaceful and the right of free speech is in no way infringed by the statute or the order of the board." (p. 354). (R. II 71).

The petitioners are now in this Court still misconstruing the statute and still arguing deprivation of constitutional rights of freedom of speech under the 14th amendment, based upon a construction of the challenged section expressly repudiated by the highest Court of the State,—just as if the challenged section were before this Court for construction as an initial proposition and without the High Court of the State ever having passed thereon.

B. It is apparent from petitioners' argument that their real quarrel with the decisions under review is a quarrel with the Supreme Court's construction of the statute—such criticism raises no federal question.

In connection with petitioners' argument that sec. 111.06 (2) (e) unlawfully deprives them of the right of freedom of speech guaranteed by the 14th amendment (pp. 25-30 of petitioners' brief), petitioners' contention is that the Court erred in not testing this particular section upon its face wholly and completely disassociated from all other provisions of the act and wholly and completely disassociated from sec. 111.15 of the act, which latter section by its express language, prohibits any construction of this section of the act or any other section of the act so as to invade unlawfully the right of freedom of speech.

On p. 29 of petitioners' brief it is stated:

> "* * * And although the Wisconsin Supreme Court in its opinion states specifically that it was concerned only with Section 111.06 (2) (e) of the Wisconsin Statutes, it, nevertheless, did not test such statute on its face, but apparently sought to ground its opinion on other provisions of the law such as Section 111.06 (2) (f), which makes it an unfair labor practice to engage in threats, intimidation, force, or coercion. Yet Section 111.06 (2) (f) was not in the case, did not afford the basis for the order of the Board, and the Wisconsin Supreme Court expressly stated that it was Section 111.06 (2) (e) with which it was concerned and no other section."

The Court did not ground its opinion upon sec. 111.06 (2) (f). The Court simply construed sec. 111.06 (2) (e)

to comprehend within its terms only violent, intimidating or coercive picketing, boycotting and other overt concomitants of a strike by persons acting in concert.

Again on p. 54 of petitioners' brief it is stated:

> "It is regrettable that the *Meadowmoor* decision of this Court has been utilized by justices who have refused to accept the principles pronounced in the Norris-La Guardia Act and in the *Swing* case, or who have sought to *construe* statutes to death for the purpose of overcoming and defeating the decisions in the Thornhill, Carlson and Swing cases."

This and like argument found elsewhere in petitioners' brief obviously presents no federal question. The Supreme Court of the state is the final authority upon construction of the challenged section. Petitioners have no constitutional right that we know of to have a statute construed as they contend it must be construed to the end that a serious constitutional quesion will be presented.

1. The Supreme Court of the State merely took the traditional approach of the judiciary toward any question of statutory construction where constitutional rights are involved, namely that of adopting a construction which would not present any grave question of constitutionality, of saving and not destroying even though the interpretation arrived at might not be the most obvious interpretation.

The cardinal principle of statutory construction is to save and not to destroy. In *National Labor Relations Board v. Jones & Laughlin*, 301 U. S. 1, 30, 57 S. Ct. 615, 81 L. ed. 893 (1937) this Court said:

> "* * * The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same. *Federal Trade Comm. v. American Tobacco Co.*, 264 U. S. 298, 307; *Panama R. Co. v. Johnson*, 264 U. S. 375, 390; *Missouri Pacific R. Co. v. Boone*, 270 U. S. 466, 472; *Blodgett v. Holden*, 275 U. S. 142, 148; *Richmond Screw Anchor Co. v. United States*, 275 U. S. 331, 346."

This rule likewise applies even though a different construction would be more obvious or natural.

State of Wisconsin ex rel. Wisconsin Development Authority, et al. v. Dammann, 228 Wis. 147, 280 N. W. 698 (1938);

Petition of Breidenbach, 214 Wis. 54, 62, 252 N. W. 366 (1934);

Johnson v. City of Milwaukee, 88 Wis. 383, 60 N. W. 270 (1894).

No case has been directed to our attention, nor do we know of any, where this Court has ever held that this traditional approach of the judiciary to a problem of statutory construction involving constitutional rights must be departed from in the field of civil liberties and that in such field the Courts are in duty bound to so construe a statute as to render it subject to constitutional attack or so as to present a serious constitutional question.

Petitioners' real quarrel and criticism of the Court is obviously directed at the Court's interpretation of the statute. That presents no federal question.

C. The Wisconsin Supreme Court in substance construed sec. 111.06 (2) (e) and the terms used therein to comprehend only violent, intimidating or coercive picketing, boycotting and other overt concomitants of a strike by persons acting in concert; decided that said section, when read in the light of sec. 111.15, could not be construed to deny a minority the right to peacefully picket or exercise the right of freedom of speech and that sec. 111.15 forbade any such construction--analysis of the decisions.

Analysis of either the original decision of the Court or its decision on motion for rehearing will support no other interpretation than that set forth above.

With reference to the statute involved in the *Thornhill case* the court said,

"* * * As construed by the state court it prohibited

the publicizing of the facts of a labor dispute whether by printed sign, by pamphlet, by word of mouth, or otherwise. The peace act deals with concert of action in carrying on an unauthorized strike by the usual overt acts concomitant of a strike." (p. 340-341) (R. II 55).

"* * * The peace act expressly provides that it shall not be so construed as to impair the right of free speech. * * * The right to speak freely is guaranteed by the constitution, but that right, the same as other rights guaranteed by the constitution, is subject to limitations. In the exercise of that right one is not free from liability for libel, duress, or fraud, although speech was the agency in each case. *John F. Jelke Co. v. Beck* (1932), 208 Wis. 650, 242 N. W. 576; *Wisconsin Labor R. Board v. Fred Rueping L. Co.* (1938) 228 Wis. 473, 279 N. W. 673. See also *Schenck v. United States* (1919), 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470; *Gitlow v. New York* (1925), 268 U. S. 652, 45 Sup. Ct. 625, 69 L. ed. 1138." (p. 341) (R. II 55)

"* * * The fact that any employee in the course of doing the designated acts may use speech as a means of carrying on his activities, does not bring the acts within the protection of the constitutional guaranties of free speech. The term 'picketing,' as used in sub. (2) (e), sec. 111.06, Stats. 1939, does not include acts held in the *Thornhill Case, supra,* to be within the protection of the constitutional guaranty of the right of free speech. The express language of the act forbids such a construction. It clearly refers to that kind of picketing which the *Thornhill Case* says the state has power to deal with 'as a part of its power to preserve the peace, and protect the privacy, the lives and the property of its residents.' " (p. 341-342) (R. II 56)

"As already pointed out, the Wisconsin statute expressly provides that it shall be so construed and applied that it shall not interfere with the right of free speech. As we understand and construe the statute, the right of free speech is not interfered with. The conduct complained of in this case, and described as 'picketing,' was not the sort of conduct that was indulged in by the defendant in the *Thornhill Case*, *supra*. The conduct complained of in this case and dealt with by the board and by the court was of an entirely different character. It was mass picketing, organized and carried on by the unions supplemented by boycott and violence, and was clearly within the exception stated in the *Thornhill Case* warranting state action. In that case the supreme court of the United States said (p. 105):

> "'We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger.'

"Ch. 111, Stats. 1939, is a statute of that character. We do not understand the decisions of the United States supreme court to mean that there can be no regulation of the right of picketing. That court has not yet said that a person who goes upon the premises of another for the purpose of creating a disturbance and disorganizing the other's business, is protected in the doing of such acts by the constitutional guaranty of free speech. In this case it is undisputed that numerous assaults were committed by pickets; that the pickets acted in concert; that the fines of these pickets were paid by the unions; that ingress and egress to and

from the premises of the employer were prevented by force and arms. It was at conduct of that kind that the statute was aimed. It is conduct of that kind that is dealt with in this case. It is conduct of that kind that is declared to be an unfair labor practice by the statute, and from which the defendants are ordered to cease and desist. * * *" (p. 343-344) (R. II 57, 58)

"* * * When a person is found guilty of an unfair labor practice he loses the benefit of sec. 103.53, Stats. 1939, which prescribes what acts, whether performed singly or in concert, shall be legal in the conduct of a labor dispute. * * *" (p. 345) (R. 58, 59)

"* * * But if they attempt to *coerce* their employer by concerted picketing, a boycott, or by any other similar overt act concomitant of a strike, they will be guilty of an unfair labor practice as defined in the act. We say similar overt act because the maxim of *ejusdem generis* applies. *Chicago & N. W. R. Co. v. Railroad Comm.* (1916) 162 Wis. 91, 155 N. W. 941." (Italics ours) (p. 345-346) (R. II 59)

"* * * Less than a majority may strike, but they will be under the restrictions of the statutes as to the methods of coercion which they may use. Sec. 103.53 specifies with particularity what may be considered legal in the conduct of a labor dispute. These enumerated means striking employees not guilty of an unfair labor practice are at liberty to employ. Any court or judge is forbidden to restrain the doing of such acts when done in connection with a labor dispute. The sole difference between *coercive acts* in support of a strike which has been called by a majority of members of a collective-bargaining unit and one which has not been so called is that the members of a minority group do not have the benefit of sec. 103.53, that is, by in-

> dulging in an unauthorized strike they lose their privileges under that section and are subject to the provisions of ch. 111, Stats. 1939, relating to unfair labor practices. The character of their *coercive acts* must then be determined either by submitting the controversy to the board or by 'the pursuit of legal or equitable remedies in courts of competent jurisdiction.' * * *" (Italics ours) (p. 347-348) (R. II 60, 61)

Referring to sec. 103.51, et seq., Stats. of 1937 (the State Labor Code) and the cases decided thereunder the Court says:

> "* * * All these questions relating to rights of employees to organize, conduct strikes, *boycotts, and other coercive measures* are in the field of public policy. As the court of appeals of New York said in the case already cited, and as this court has said many, many times, these questions are for the legislature. Courts do not sit to pass upon the wisdom or unwisdom of the acts of the legislature. * * *" (p. 350) (R. II 63)

Again, on motion for rehearing and in response to the petitioners' claim that the court had placed its stamp of approval upon a statute and an order based thereon prohibiting minority groups from engaging in rights guaranteed by the constitution of the United States and this for the sole reason that they were minority groups, the Court pointed out that it was almost futile to attempt to reply to such a contention in the face of the specific provisions of the statute and the specific language of the opinion; that counsel continued to misinterpret the statute and as a consequence misunderstood the opinion. The Court again points out and quotes the language of sec. 111.15 of the

statutes prohibiting any such construction (p. 352) (R. II 70)

> "Except as specifically provided in this chapter, nothing therein shall be construed so as to *interfere with or impede or diminish in any way the right to strike* * * *; nor shall anything in this chapter be so construed as to *invade unlawfully the right to freedom of speech.*"

and specifically states: (p. 354) (R. II 71)

> "* * * The picketing carried on in this case was not peaceful and the right of free speech is in no way infringed by the statute or the order of the board."

See also the other forceful language to the same effect quoted on pp. 41-43 of this brief.

1. This construction of the statute by the Supreme Court of the State is as much a part of the statute as if the words were expressly written therein—that construction is binding upon this Court.

The highest court of the State of Wisconsin has construed sec. 111.06 (2) (e) in conjunction with sec. 111.15 and sec. 111.17 of the Wisconsin Statutes exactly as if the said section read that it shall be an unfair labor practice

> "To act in concert in engaging in promoting or inducing intimidating or coercive picketing, boycotting or any overt concomitant of a strike beyond the exercise of the constitutional right of free speech, unless a majority in a collective bargaining unit of employees of an employer, against whom such acts are primarily

directed, have voted by secret ballot to call a strike even though such conduct is elsewhere recognized in the statutes as lawful intimidation or coercion."

This construction is as much a part of the statute as if it were expressly so worded. A decision construing a statute becomes an integral part of the statute itself.

Gulf, C. & S. F. R. Co. v. Moser, 275 U. S. 133, 48 S. Ct. 48, 72 L. ed. 200 (1927).

In *Milwaukee Co. v. City of Milwaukee*, 210 Wis. 336, 341, 342, 246 N. W. 447 (1933) the Wisconsin court quoted with approval from this court's decision in the *Gulf, C. & S. F. Co. case, supra*, as follows:

"A decision construing a statute becomes an integral part of the statute itself. *Gulf, C. & S. F. R. Co. v. Moser*, 275 U. S. 133, 48 Sup. Ct. 49. When a statute has been once construed by the court, it remains as construed until it is amended by the legislature or the construction given is modified or changed by the court. The statute under consideration has never been amended by the legislature since it was construed by the court, nor has the court ever in any way modified or limited the construction given. * * *"

It is axiomatic that the construction placed upon a State statute by the highest court of the State is binding and controlling upon this Court and is not subject to review in this Court.

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. ed. 1188;

Lauf v. E. G. Shinner & Co., 303 U. S. 323, 82 L. ed. 872 (1938);

Senn v. Tile Layers Protective Union, 222 Wis. 383, 268 N. W. 270 (1936);

Minnesota v. Probate Court, 309 U. S. 270, 273.

D. The challenged section as construed does not deprive petitioners or minorities of freedom of speech guaranteed by the 14th amendment as it regulates only conduct which falls outside of that area.

Conduct in relation to means employed falls within three areas (1) violence (2) intimidation or coercion and (3) exercise of the constitutional right of freedom of speech. Violence (area 1) is unlawful conduct everywhere. Intimidating or coercive conduct (area 2) clearly falls within an area which is subject to regulation by the states. Regulation within this area does not present any question of invasion of the constitutional right of freedom of speech under the 14th amendment as the regulation is in relation to conduct which falls outside of that area. Conduct which falls within the area of exercise of the constitutional right of freedom of speech (area 3) is not regulated by the section. The section regulates *means* which fall outside of area 3.

1. The petitioners not only misconstrue the challenged section but the argument made against the constitutionality thereof, however construed, is such an all-out argument for freedom of speech as an absolute right as to leave the legislatures of the several states completely powerless to cope with the problem of concert of action directed at injury of another so long as speech is a factor in accomplishing the injury—the principles for which petitioners contend are so utterly vicious as to destroy any society which harbors them.

It is asserted in petitioners' brief on pp. 25, 80 that the case presents no question of the legality of object. The case does present a question of legality of object (the point is briefed, pp. 144-145 of this brief) but whether the case does or does not present such question, it is apparent from petitioners' argument upon the absoluteness of the constitutional right of freedom of speech that there is no scope for exercise of legislative power to deal with the problem of concert of action directed at injury of another either with respect to unlawful object or unlawful means if speech is an implementing or enmeshed medium by which the unlawful object is sought to be reached or by which the unlawful means are made effective. When the right asserted is analyzed down to its essentials it is apparent that it is nothing less than that of the right of combinations to direct all of their ruinous and destructive* activities against anyone with whom the combination disagrees, under *any* and *all* circumstances, so long as the end sought is a justifiable end *in the eyes of the combination* and speech is the medium

*Unless otherwise indicated herein the term "destructive" does not refer to actual physical destruction.

or an implementing or enmeshed medium by which the injury is sought to be accomplished. This means that the legislature is powerless to cope with all manifestations of abuse of economic power by combinations,—powerless to determine under any circumstances when such intentional injury is and when it is not justifiable conduct. This is indeed a far reaching concept. It strikes at the very foundation of our society.

2. The cases cited to support the argument obviously are of no such far reaching import—analysis of the cases.

The petitioners cite *Thornhill v. State of Ala.*, 310 U. S. 88, 60 S. Ct. 736, 84 L. ed. 659 (1940); *Carlson v. State of Calif.*, 310 U. S. 106, 60 S. Ct. 746, 84 L. ed. 668 (1940) and *A. F. of L. v. Swing*, — U. S. —, 85 L. ed. 513 (Feb. 10, 1940) and other cases as sustaining their position that the challenged section of the statutes violates the constitutional guarantee of freedom of speech. The cases cited deal with very narrow questions. The decisions are specifically confined to the very narrow question dealt with in each decision.

In the *Thornhill case* the statute in question was so comprehensive in terminology as to comprehend "every practicable method whereby the facts of a labor dispute may be publicized in the vicinity of the place of business of an employer" whatever the merits of the dispute, however right the workers may have been and however wrong the employer may have been, however lawful the object of the workers, however unjustifiable the employer's refusal to bargain or meet the demands of the union or work-

ers with respect to that object, and however accurate and open and above board the expression of the workers in relation to that object.

This Court stated that the statute had to be tested upon its face (it was also tested in the light of the State Supreme Court's construction of the statute) and so testing it, the court found that it was so broad in terminology that it swept "within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press," that the statute was "a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." This Court's approach to the narrow question presented in the *Thornhill case* was that of a traditional approach to freedom of discussion and publicizing of ideas to discover and spread political and economic truth to the end that noxious doctrines in those fields may be refuted and their evil asserted by the courageous exercise of the right of free discussion,—the free competition of ideas in the open market of ideas. The statute upon its face prohibited the exercise of such right. It was accordingly struck down as unconstitutional. The Court says:

> "The statute as thus authoritatively construed and applied leaves room for no exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, *the nature of their dispute with an employer*, or the restrained character and the *accurateness of the terminology used in notifying* the public of the facts of the dispute."

Insofar as the statute dealt with picketing the Court says, "The vague contours of the term 'picket' are nowhere delineated." In the footnote the Court cites various activities that a picket may engage in. Some of those activities involve mere peaceful persuasion, with or without concert and without any enmeshment with factors which convert to the field of coercion,—which convert to an actual manifestation of force. For the first time in its history this Court recognized that the activities of a picket may take such a wide range, some of which are entitled to constitutional protection, that a *criminal* statute which proscribes all picketing and under any and all circumstances is too sweeping in its terms. A picket *may*, under the facts of a case, merely be exercising the right of freedom of speech.

Furthermore, in the *Thornhill case* the court states:

> "It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants. * * *"

The Court further says:

> "The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted."

The latter statement will also be found in the last paragraph of the opinion in the *Carlson case*.

There is implicit in every argument that petitioners make upon the issue of freedom of speech, the proposition that the State's police power to protect and preserve the peace *"and to protect the privac , lives and property of its residents"* is limited to that of protecting such privacy, lives and property from acts of physical violence. Since when did the police power of the State become so proscribed? Needless to state, no case is, or can be cited to the effect that the police power of the State is so limited.

The rationale of the *Carlson case* is identical to that of the *Thornhill case*. The *Carlson case* deals with a problem just as narrow in scope as that dealt with in the *Thornhill case*.

The *Swing case* deals with a very narrow question. This Court was not agreed as to just what, if any, question was presented by "the none too clear record." The decree of the appellate Court was:

> "* * * that this Court and the Supreme Court of this State have held in this case, that, under the law of this State, peaceful picketing or *peaceful persuasion* are unlawful when conducted by strangers to the employer (i.e., where there is not a proximate relation of employees and employer), and that appellants are entitled in this case to relief by injunction against the threat of such peaceful picketing or persuasion by appellees".

The majority of the Court felt that the record presented the question of the validity of the final decree of the appellate Court as above set forth. The Court states that all it has before it is a case of "peaceful persuasion." That "peaceful persuasion" was enjoined because those engaged

therein did not occupy the position of employees. The Court holds that:

> "* * * A state cannot exclude workingmen from peacefully exercising the right of *free communication* by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. * * *"

The Court does not discuss the term "picketing" in its analysis of the narrow issue. As the Court construed the question presented by the record, the record limited the Court to the bare question of whether "peaceful persuasion" (not enmeshed with other factors) could be banned if there were no employer-employee relationship. Obviously the question decided was a very narrow one.

None of the cases above analyzed deal with the problem of concert of action directed at injury to another. Nor do they deal with the facts of the particular case. They deal with statutes, ordinances or court decisions which upon their face *may* include within the ambit of the statute, ordinance or decision that which constitutes freedom of speech.

The decisions in nowise limit the law of unlawful conspiracy. Conspiracy is defined by Chief Justice Hughes in *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 84 L. ed. 1311 (1940) p. 1335 as follows:

> "* * * 'Conspiracy' is a familiar term of art and means a combination of two or more persons by concerted action to accomplish an unlawful purpose, or some purpose not in itself unlawful by unlawful means. * * * "

Wisconsin decisions are to the same effect. *Holtz v State*, 76 Wis. 99, 108, 44 N. W. 1107 (1890); See also: *Martens v. Reilly*, 109 Wis. 464, 84 N. W. 840 (1901); *Randall v. Lonstorf*, 126 Wis. 147, 105 N. W. 663 (1905); *Schultz v. Frankfort M., A. & P. G. Ins. Co.* 151 Wis. 537; 139 N. W. 386 (1913); *Judevine v. Benzies-Montanye Fuel & Whse. Co.*, 222 Wis. 512, 269 N. W. 295 (1936); *State ex rel. Durner v. Huegin*, 110 Wis. 189, 85 N. W. 1046 (1901), commencing at page 243. This latter case is again reported in *Aikens v. State*, 113 Wis. 419, 89 N. W. 1135 (1902). It later went to this Court and is reported in 195 U. S. 194.

In *Boyce v. Independent Cleaners, Inc.*, 206 Wis. 521, 527, 240 N. W. 132 (1932), which case involved an unlawful conspiracy, the Court well said:

> "• • • The gentle influence of law and custom will prove ineffective in the accomplishment of its noble purpose unless individuals with rights to preserve and protect can readily find a way to combat organized tyranny in the commercial world, just as certainly as will our political rights fade away unless we keep open the avenue to the tribunals for their public vindication. • • •"

Workers have been exempted to a considerable extent from the laws of unlawful conspiracy, either through legislative declarations of policy or in the absence thereof through the courts exercising the quasi-legislative function of determining policy. Dissenting opinion of Justice Brandeis in *Truax v. Corrigan*, 257 U. S. 312, 66 L. ed. 254, 27 A. L. R. 375, 401-403 (1921).

Concerted action by workers to enforce demands necessarily involves the infliction of intentional harm. The

privilege of workers by concert to inflict such harm has, in the recent development of the law, all revolved around the public policy of the States as to justification for such injury because of the self interest of workers in the economic conflict.

Restatement of Law of Torts, Vol. 4, pp. 94-97;

Truax v. Corrigan, supra;

Duplex v. Deering, 254 U. S. 443, 65 L. ed. 349 (1921).

Certainly within reasonable limits the legislature may withdraw the privilege both in relation to object and in relation to intimidating or coercive means. The *Thornhill case* specifically cited and with approval the following language of Justice Brandeis in the case of *Duplex Co. v. Deering*, 254 U. S. 443, 65 L. ed. 349 (1921):

> "Because I have come to the conclusion that both the common law of a State and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute pro-

cesses of justice for the more primitive method of trial by combat." (p. 488)

None of the cases analyzed support the proposition that combinations may engage in peaceful picketing where the object of the combination is to compel an employer to commit an unlawful act. There can be no justification in the law for such picketing even though the picketing as such is peaceful and as such is not of an inherently intimidating or coercive character. Concert to inflict injury under such circumstances cannot be characterized as other than concert to inflict malicious injury.

In *Aikens v. Wisconsin*, 195 U. S. 194, 205, this Court, speaking through Justice Holmes, said:

> "* * * But an act, which in itself is merely a voluntary muscular contraction, derives all its character from the consequences which will follow it under the circumstances in which it was done. When the acts consist of making a combination calculated to cause temporal damage, the power to punish such acts, when done maliciously, cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts. No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law."

In the Restatement of the Law of Torts, Chap. 38, Vol. 4, dealing with the subject of permissible conduct in

labor disputes, the authors carefully pointed out that announced rules as to the "privilege" of the workers to inflict economic loss in certain defined situations, regardless of whether the "object" has the support of a majority of the workers affected, was stated as the law only *"in the absence of applicable legislation to the contrary."*

> Restatement of the Law of Torts, Vol. 4, pages 120, 125, 126, 129, 140, 153, 156, 161.

The above observation must now be read in the light of the *Swing case*. We find no language in the *Swing case*, however, to indicate that concert of action directed at injury of another can never be subjected to legislative regulation either with respect to unlawful object or unlawful means if speech is an implementing or enmeshed medium by which the unlawful object is sought to be reached or by which the unlawful means are made effective.

Nor do we find any language in the decisions cited which can be taken as overruling the force or the legal soundness of the Restatement of the Law of Torts, Ch. 38, Sec. 495, p. 135, as follows:

> "An act by an employer which would be a violation of a legislative enactment or contrary to a defined public policy is not a proper object of concerted action against him by workers."

In the comment at page 136, the authors add:

> "* * * The expression of public policy is not confined to legislation and criminal law; in passing upon the propriety of an object, public policy otherwise defined is an important factor. *If the object is an act against*

which the law has definitely set its face, it is not a proper object of concerted action."

In connection with the foregoing, we call attention also to the following extracts from the general discussion of the "Significance of (the) object" of "concerted action." (id Topic 2, 117).

> "The object of concerted action is an important factor in determining liability or non-liability for harm caused by the action. Some conduct, for example, physical violence, may be unprivileged in any case. Other conduct, for example, economic pressure by peaceful persuasion or otherwise, may be privileged for one object, such as increase of wages, and unprivileged for another object, such as the committing of a crime. * * *"

Nor do any of the decisions in any wise effect the rule stated in the same work, sec. 775, as follows:

> "Workers are privileged intentionally to cause harm to another by concerted action if the object and the means of their concerted action are proper; * * *"

None of the cases cited support the proposition that picketing is entitled to constitutional protection as freedom of speech under the 14th amendment when it is used as an instrument of perfecting and maintaining a boycott. An organized boycott by concert of action obviously falls within the sphere of use of intimidating or coercive means to secure the meeting of demands. We can see no conceivable basis whereby it can be said that an organized boycott directed at coercing the meeting of demands made is entitled to constitutional protection as an exercise of freedom

of speech. Boycotting by concert of action obviously lies within the sphere of legislative policy. Economic pressure by way of an organized boycott, whether primary or secondary, is by no means a constitutional right. When picketing is used as an instrument of perfecting and maintaining a boycott, the area within which a picket may operate as an exercise of the constitutional right of freedom of speech has been far exceeded. There is nothing in any of the cases analyzed which indicate that picketing enmeshed with boycott as the instrument by which it is perfected and maintained is entitled to constitutional protection as an exercise of freedom of speech.

The freedom of speech which is subject to constitutional protection is that of speech as an "appeal to reason by all the peaceful means of gaining access to the mind." *Milk Wagon Drivers Union of Chicago, Local No. 753 v. Meadowmoor Dairies, Inc.*, (Feb. 10, 1941) 312 U. S. 287, 85 L. ed. 497. The free competition of ideas in the open market of public opinion (*Thornhill v. State of Ala.*, 310 U. S. 88, 84 L. ed. 1093 (1940)).

This Court in the *Meadowmoor case* was dealing only with picketing enmeshed with violence as a means of coercion. The Court throughout the opinion, however, speaks of the ample power of the State to deal with manifestations of force in the settlement of industrial conflicts and "the power of the states to prevent future coercion." It speaks of picketing removed from the coercive influence of force.

The *Meadowmoor case* very clearly expounds the doctrine that power is left in the states to deal with all *manifestations* of force. Manifestations of force are by no means confined to acts of violence. See for instance *Gompers v.*

Buck's Stove & Range Co., 221 U. S. 418, 55 L. ed. 797 (1911) where the court says:

> "The court's protective and restraining powers extend to every device whereby property is irreparably damaged or commerce is illegally restrained. To hold that the restraint of trade under the Sherman anti-trust act, or on general principles of law, could be enjoined, but that the means through which the restraint was accomplished could not be enjoined would be to render the law impotent.
>
> "* * * *
>
> "In the case of unlawful conspiracy, the agreement to act in concert when the signal is published, gives the words 'Unfair,' 'We don't patronize,' or similar expressions, a force not inhering in the words themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they become what have been called 'verbal acts,' and as much subject to injunction as the use of any other force whereby property is unlawfully damaged. When the facts in such cases warrant it, a court having jurisdiction of the parties and subject matter has power to grant an injunction." (pp. 438, 439)

To say that the legislature has the power to confer certain rights and to outlaw certain practices and at the same time deny the legislature the power to enjoin or prohibit the means by which the policy is thwarted, is in reality a denial of legislative power to act at all.

If the petitioners have the constitutional right to coerce, through organized economic pressure conduct of another in accordance with their wishes, under any and all circumstances, employers must have the same right under any

and all circumstances. The gains that labor has made in the industrial field as a result of passage of the National Labor Relations Act and the present Employment Peace Act directed at protecting labor in its right to organize and bargain collectively, free from employer dominance or interference, must fall by the wayside. If organized labor has the constitutional right to compel conduct in accordance with its wishes by use of economic pressure under any and all circumstances, the employer must have the same right. Many of the company unions that have been disestablished by National and State Boards because of employer dominance or interference have been disestablished on the basis of what the employer has said or done or what his employees have said or done, indicating coercive economic pressure to prevent the free exercise of the employees' right to organize and bargain collectively. If freedom of speech carries with it the right of economic coercion under any and all circumstances, it would seem apparent that many of the gains made by organized labor as a result of disestablishment of company dominated unions must become a thing of the past. The employer, under the banner of freedom of speech, must have the constitutional right to dominate and coerce by exercise of the same economic pressure.

The same argument applies to the employer's right to interfere and coerce through economic pressure and thus prevent formation of any labor organization within his plant so long as the economic pressure and coercion is exercised through the medium of speech.

Sec. 111.06 (1) (k) makes it an unfair labor practice for an employer "to make, circulate or cause to be circu-

lated a black list as described in sec. 343.682." If the petitioners' arguments are sound, the legislature is lacking in power to outlaw such black list practices.

None of the cases cited support the proposition that the State is without power to deal with violent, intimidating or coercive means through the concreteness of individual litigation rather than through the abstractions of a general law. In the last analysis this is all that the State has done in the enactment of the challenged section.

None of the cases cited support the proposition that picketing by combinations is entitled to constitutional protection where the object sought is to inflict economic loss upon employees for the purpose of compelling them to join a particular union. If freedom of speech encompasses such right as a constitutional concept, the concept will in the end be ruinous to labor itself. It will make labor the victim of organization rather than the beneficiary of it. Under the banner of freedom of speech, the AF of L would have the constitutional right to intentionally inflict economic loss upon every employee member of CIO and vice versa for the purpose of compelling them to surrender the affiliation of their choice and to join a union not of their choice. It is not difficult to envision the direction in which the acceptance of such a concept takes us.

Because of the clarity of expression and soundness of concept, we quote from a recent decision of Judge Aarons, Circuit judge for Milwaukee County, in the Golden Guernsey case entitled "Wisconsin Employment Relations Board, Petitioner, v. Milk and Ice Cream Drivers and Dairy Employees Union, Local No. 225, I. B. of T. C. S. & H. of A., Respondents: (3 Labor Laws 60,049).

"There is nothing in the language of *Thornhill v. Alabama*, 84 L. ed. (U. S.) 659 and *Carlson v. California*, 84 L. ed. 668, which implies that it is a violation of any provision of the constitution for a state to enact reasonable regulations providing for the pursuit of definite legal processes before tribunals created by law in matters pertaining to labor relations; and restraining concerted efforts in the use of economic pressure where such legal processes are not pursued. There is nothing in those cases that prevents the state from banning combinations formed to carry out an unlawful purpose, even though speech is the medium by which such unlawful purpose is sought to be consummated. Nor is there anything in those cases which prevents the state from making reasonable regulations to protect the freedom and independence of employees to determine and express their views as to their choice of collective bargaining agencies, unhampered by any interference calculated to impair that independence. * * *"

This case on appeal to the Supreme Court of Wisconsin is reported in 238 Wis. 379, 299 N. W. 31 (1941).

If the legislature has the power to protect a worker in his right to organize and bargain collectively through representatives *of his own choosing* without intimidation or coercion from any source, if the legislature has the right to protect the freedom and independence of employees to determine and express their views as to their choice of collctive bargaining agencies, unhampered by any interference calculated to impair that independence, if the legislature has the right to say to the employer; you shall not coerce your employees, the legislature must have the *power* to protect both employees and employers, must have the

power to protect the employees from coercion or against concert of action directed at the infliction of intentional injury upon them as a result of their having exercised their choice, and must have the power to protect the employer from concert of action directed at the infliction of intentional injury upon him as the result of his having met the standard of fairness which the legislature said he must meet, namely, refrain from coercive conduct.

For cases giving the widest conceivable latitude to the constitutional concept of freedom of speech but recognizing that this constitutional right cannot be pressed to a point where the legislature is left completely impotent to deal with the problem of concert of action directed at injury of another, see *Schwab v. Moving Pictures Machine Operators, Local 159 et al*, —Ore.—, 109 P. (2) 600 (Jan. 28, 1941). To the same effect see *Eastwood-Neally Corp. v. International Assoc. of Machinists*, 124 N. J. Equity, 274, 1 Atl. (2) 477. See also *McKay v. Retail Automobile Salesman Local Union 1067*, — Cal. —, 106 P. (2) 373 (1941); and *Smith Metropolitan Market Co. v. Lyons et al*,— Cal. —, 106 P. (2) 414, (1941).

In both the Oregon and New Jersey cases, supra, it was held that picketing directed to the accomplishment of an unlawful purpose is not entitled to constitutional protection as an exercise of freedom of speech.

E. Because of the construction placed upon the challenged section by the Supreme Court of Wisconsin there is no occasion for this Court to appraise the substantiality of the need for it* but even if there is such occasion, it is manifest that there was and is a substantial need because of (1) the power given to labor under prior state legislation, (2) the abuse of this power by labor, (3) the bitter struggle then and now being waged within the ranks of organized labor, —the AFL—CIO conflict, (4) problems which arose out of new acts beneficial to organized labor such as the National Labor Relations Act and the State counterpart thereof, and (5) facts known to all with respect to the functioning of organized labor including peaceful picketing used as an instrument to perfect and maintain a boycott.

The petitioners' brief (p. 22) characterizes the act as a whole as one seeking to impose upon the workers of the state an involuntary condition of servitude and as one which seeks to deny to them constitutional rights. The legislature, the administrative body (the board) and the Courts of the State are all accused of joining in seeking to bring about such condition.**

It is further stated by petitioners: (p. 21 of their brief)

"The enactment of chapter 111 constitutes a deliberate attempt on the part of the Wisconsin Legislature to circumvent the holdings of this Court in the

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*The section regulates in area (2) and not in area (3). See p. 53 of this brief.

**Such argument by way of accusation, coming from one who has always been recognized as one of organized labor's most vocal exponents in the State is at least some indication that the legislature was not entirely superslitious when it concluded that the time had come to enact legislation calculated to balance the rights of all major interests involved in industrial controversy.

cases of *Senn v. Tile Layers' Protective Union*, 301 U. S. 468; *Lauf v. Shinners*, 303 U. S. 323, and *New Negro Alliance v. Sanitary Grocery Company, Inc.* 303 U. S. 552. * * *"

It is not readily perceivable wherein the enactment of a new law by the legislature of a State presents any question of circumvention of the holdings of this Court in cases decided by this Court under a different State law. So much for the first two cited cases. Further, this Court did not determine the substantive rights of labor under the Wisconsin law involved in those cases. That was determined by the Supreme Court of the State of Wisconsin. This Court merely passed upon constitutional issues raised with respect to the law thus interpreted. The last cited case involves jurisdiction of the Federal Courts under the Norris-LaGuardia Act. We are not aware that the Norris-LaGuardia Act destroyed the police power of the state or that this Court has ever so held.

The mere characterizing of the Employment Peace Act as one designed to impose an involuntary condition of servitude upon labor and as one designed to defeat rights secured by the 14th amendment to the Constitution of the United States and the unwarranted assertion that the legislature, the administrative body and the courts of the State are all seeking to bring about that result, hardly establishes any point. The legislation is not designed to accomplish any such purpose. The legislation represents a sincere legislative effort to carefully balance the rights of all three major interests in industrial conflicts, namely the employee, the employer and the public.*

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*The scope, purpose and provisions of the act are analyzed on pp. 96-109 of this brief.

I. Background of the Employment Peace Act.

As set forth in petitioners' brief on pp. 18-19, the legislature of the state of Wisconsin, in several well known legislative enactments, was in the vanguard in enacting legislation favorable to labor. The legislature enacted as substantive law the provisions of the Federal Clayton Act. *A. J. Monday Co. v. Automobile A. & V. Workers*, 171 Wis. 532, 177 N. W. 867 (1920). The Norris-LaGuardia Act is but the federal equivalent of what became known as our state labor code. *American Furn. Co. v. I. B. of T. C. & H. of A.*, 222 Wis. 338, 268 N. W. 250 (1936). These acts were directed at equalizing the bargaining power of labor with that of employers. These acts were held to confer substantive rights upon labor. *Trustees of Wis. S. F. of Labor v. Simplex S. M. Co.*, 215 Wis. 623, 256 N. W. 56 (1934), *American Furn. Co. v. I. B. of T. C. & H. of A.*, 222 Wis. 338, 268 N. W. 250 (1936), *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323, 82 L. ed. 872 (1938), *Senn. v. Tile Layers Protective Union*, 301 U. S. 468, 81 L. ed. 1229 (1937).

In 1937 the legislature adopted what was commonly known as the "Little Wagner Act". *Wisconsin Labor Relations Board v. Fred Rueping L. Co.*, 228 Wis. 473, 279 N. W. 673 (1938).

When the legislature met in 1939 and enacted the Employment Peace Act, it was not enacting legislation wholly divorced from experience. It was enacting legislation in the light of experience and in the light of problems which arose out of such experience under laws which were extremely favorable to labor.

2. Problems that arose under the old code.

The power that had been given to labor unions under the code presented very real and substantial problems. There was and is nothing fanciful about them. Refer to the Senn case. Senn was a small contractor in the tile-setting business in Milwaukee. It was a small concern and he employed only a very few men in his business. In addition to hiring tile setters, he performed services usually rendered by a journeyman or helper in that business. The AF of L union involved set out to put him out of business. He offered to meet every demand that they made upon him. He offered to compel all of his employees to join the union and offered to join the union himself, but the rules and regulations of the union were such that he could not join even though there was no question about his qualifications. All of the forces of organized labor were directed at him to put him out of business,—to prevent him from maintaining his only means of livelihood.

The problem presented in the *Senn case* was whether the legislature could permit combination to injure another to the extent permitted in that case without impinging upon the employer's constitutional rights under the [redacted] 14th Amendment. We have no intention of criticising the result of the *Senn case* in either the State Courts or this Court. It was decided that no constitutional right of the employer was violated by permitting such combination to injure and that whether it was wise or unwise to permit such combination under such circumstances was a matter of public policy of the state for the legislature to determine.

Many able lawyers and judges felt that property rights of an employer protected by the [redacted] 14th Amendment

to the Constitution of the United States were impinged when the legislature permitted concert of action to injure one to the extent permitted in the *Senn case*. See the vigorous dissent of Justice Fowler in *Senn v. Tile Layers Protective Union*, 222 Wis. 383, 268 N. W. 270 (1936) and of Justice Butler in said case in this Court, 301 U. S. 468, 81 L. ed. 1229 (1937). The same applies to circumstances such as were disclosed in *Lauf v. E. G. Shipner & Co.*, 303 U. S. 323, 82 L. ed. 872 (1938). See the dissent in that case.

It is certainly arguable from an examination of the facts disclosed in the *Senn case* than our then code had gone too far and had more thn equalized the bargaining power of labor. To some at least, it would appear that the then state labor code permitted organized labor to bring all of its destructive forces to bear against an individual who had done no wrong, who was not unsympathetic to labor, who was willing to have all of his employees join the union and who was willing to join the union himself except that the union would not let him. To some at least, the legalizing of concert of action aimed at such spoilation and destruction seemed at variance with some of the most cherished concepts of American life. The legislature made such combination lawful. It had the right to make such combination unlawful.

The *Senn case* illustrates the power which the legislature had conferred upon labor unions and the manner in which that power was being exercised. There was no possible alternative or manner in which Senn could meet the forces of organized labor. His situation was as pathetic as that of an individual employee endeavoring to bargain alone with the forces of organized capital. It seems to us

that it could be only a matter of time before the legislature would legislate to restore primary rights of persons so circumstanced as Senn to earn a living free from combinations aimed at destroying his only means of livelihood.

It hardly meets Senn's predicament to say that organized labor did not intend to injure Senn and that the injury caused to him was incidental to organized labors intention to benefit its own members. The primary objective of most unlawful conduct is that of helping oneself at the expense of others. That purpose does not make the conduct lawful as a matter of constitutional right. The legislature may make the objective unlawful. The legislature had made the unions' objective, with respect to Senn, lawful. It had the right to make that objective unlawful and did so.

Wisconsin's Labor Code did give tremendous power to labor unions. Unions had the power to make unionization an end in and of itself without regard to whether such unionization in a particular plant or a particular controversy was or was not benefiting the mass of labor involved in the drive for unionization and with total disregard to the harm inflicted upon industry.

The all-union agreement of organized labor became a fetish. Much of the industrial strife was based upon that issue and that issue alone. In many of the controversies there was not a single wage, hour or working condition issue involved. The instant case is illustrative. The all-union agreement was a legitimate object of organized labor, even though the union seeking such object did not represent a single employee of the employer. There was a silent voice in these controversies and that was the voice of the affected employee himself. Organized labor was permitted to use

all of the coercive instrumentalities at its command to coerce an employer to make his employees join the union. The employees themselves had nothing to say about the matter. If the employer yielded to the union's demand the workers either joined or lost their jobs. This was the law of Wisconsin throughout some of the worst depression years that this country ever experienced. To say that the employees had any *free choice* under such circumstances is a plain ignoring of the realities of economic facts. When an employer yielded to this pressure (always injurious and many times ruinous) the employees were forced either to join the union or accept public relief. The employee himself was subjected to a condition of servitude to organized dominance insofar as any free choice with respect to collective bargaining was concerned.

No one has ever been able to reconcile the concept that workers should have full freedom of association, self-organization and designation of representatives of their *own choosing* for purposes of collective bargaining with the all-union agreement. The Wisconsin Supreme Court gave serious consideration to the subject in *American Furniture Co. v. I. B. of T. C. & H. of A.*, etc., 222 Wis. 338, 268 N. W. 250 (1936) but was unable to reconcile the two concepts. The court said:

> "We are faced with the seeming contradiction that while the act contains no expressed intention to outlaw closed-shop agreements, it is expressly provided that activities of employees in the direction of association and organization for bargaining purposes shall not be subject to coercion or interference by employers. * * *
>
> "The question is not easy of solution. Defendants contend that the purpose of the act is merely to prevent

dominance by an employer of the organization of his employees and that, so long as he exacts as a condition of continued employment membership in an outside union over which he has no control, the purposes of the act are promoted rather than defeated. While much may be said for this view, *it is extremely difficult to reconcile with the full freedom of association and designation of representatives which the act expressly secures to the men.* It may well be that if, when negotiations for a closed shop are initiated between an outside labor union and an employer, *the employees have already exercised, free from their employer's domination, or are in the process of so exercising their right to organize and to select representatives for collective bargaining,* the employer may not insist that another or different plan of organization be adopted or that other representatives be chosen. *If he may not, then no pressure may be brought to bear upon him by an outside union to compel such action.* Whether pressure of the sort authorized by the act may be brought upon the employees by the outside union, *it is unnecessary to determine,* although in this connection it may be significant that neither the Wisconsin Labor Code nor the Norris-LaGuardia act *contain any provisions expressly inhibiting labor organizations from exercising the coercion and domination prohibited to employers.* See 47 Harvard Law Rev. 117; 21 Cornell Law Quarterly Rev. 640.

"We do not find it necessary finally to determine the difficult questions above set forth. Assuming that defendants' contentions with respect to them be rejected and the rule most favorable to plaintiff established, the result in this case would not be affected."

The two concepts are irreconcilable. Such an agreement being a lawful objective of organized labor, regardless of whether the involved union represented a majority of employees of an employer in a collective bargaining unit, or represented any employees of the employer, plus the economic conditions of the times, resulted in a large measure in defeating the exercise by workers of *full freedom* of association, self-organization and designation of representatives of their own choosing for purposes of collective bargaining.

If one inclines to the view that power of such nature as that conferred by the Wisconsin State Labor Code invites abuse (history demonstrates that unchecked power is always abused) and will ultimately prove detrimental to the public as well as to a substantial element of labor itself, it may be seriously questioned whether the existing laws were consonant with the public interest or the interests of labor itself.

It was not even suggested in the *Senn case* in this Court that the legislature lacked competency to deal with problems arising under the code. This Court, by Justice Brandeis, said:

> "* * * The laws of Wisconsin, as declared by its highest court, permit unions to endeavor to induce an employer, when unionizing his shop, to agree to refrain from working in his business with his own hands—so to endeavor although none of his employees is a member of a union. Whether it was wise for the State to permit the unions to do so is a question of its public policy—not our concern. The Fourteenth Amendment does not prohibit it." (*Senn v. Tile Layers Protective Union*, 301 U. S. 468, 81 L. ed. 1229, 1237-1238 (1937))

In the short space of a few years, upon the basis of contentions made in the petitioners' brief, the problem seems to have become not one of whether the legislature has power to permit such combination to do injury to another without impinging upon constitutional rights of that other but whether the legislature has the power to prohibit under any circumstances such combined action directed at the injury of another. The claim is asserted under the banner of freedom of speech. Reduced to its essentials, the claim asserted by petitioners is that of a constitutional right under the disguise of free speech to combine to do injury to another under *any and all circumstances.*

3. New acts promotive of labor's interests, such as the National Labor Relations Act, and factional wars within the ranks of labor gave rise to additional real problems.

When the legislature met in 1939 and passed the Employment Peace Act, it was, of course, cognizant of the war that has been waged in the ranks of labor, that is, the bitter struggle that had gone on for a number of years between AF of L and CIO, the two strongest national labor organizations. The conflict had been carried to such extremes that the President of the United States had asked the warring unions to settle their differences in the interests of the public as well as in the interests of labor itself. Neither union had to that date manifested any interest in adjusting those differences—nor have they even to this date. It is perfectly conceivable that the underlying philosophies of the two unions are such that their differences are irreconcilable and that both unions sincerely believe that the cause of labor

can only ultimately be served by one of the two warring unions gaining supremacy.

But such bitter union wars are not promotive of public welfare, oftentimes are not promotive of the labor element involved in a particular controversy and further, oftentimes the employer is caught between the millstones of these warring factions within the ranks of labor. It certainly is not promotive of the public interest to permit such factional wars to such an extent that the employer, the public and labor itself are the victims of warring philosophies of unionism within the ranks of labor.

The situation of the employer caught between the millstones of these warring unions is well illustrated in *Union Premier Food Stores v. Retail Food C. & M. Union, etc.*, 98 F. (2) 821 (1938)* and in *Fur Workers Union, Local No. 72 v. Fur Workers Union*, 105 F. (2) 1 (1939).** Other cases where the employer was helpless when caught between the millstones of these two warring unions in the ranks of labor are cited in the Circuit Courts of Appeal decisions in these two cases.

In an article in the National Lawyers Guild for January, 1940, Volume 2, No. 4, Mr. Padway, general counsel for the AF of L, urged that under the National Labor Relations Act and the Norris-LaGuardia Act, the Federal Courts are without power under the latter act to enjoin picketing by a minority union in those instances where there has been a representation dispute, the problem submitted to the National Board and the board has certified

*Certiorari was granted by this Court and the case subsequently dismissed.—60 S. Ct. 376.

**Certiorari was likewise granted by this Court, and the judgment of the Circuit Court of Appeals affirmed—84 L. ed. 247.

a particular union as the representative of all of the employees for purposes of collective bargaining. Under such circumstances, it would be an unfair labor practice for the employer to bargain collectively with any other union than that certified by the board. *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515, 81 L. ed. 789 (1937); *National L. R. Bd. v. Jones & Laughlin S. Corp.*, 301 U. S. 1, 81 L. ed. 893, 108 A. L. R. 1352 (1937).

It seems that a similar problem existed under the Wisconsin Labor Code and the State Labor Relations Act prior to its abolishment and the enactment of the Employment Peace Act, Ch. 57, Laws of 1939 (May 4, 1939).

Regardless of the merits of such contention (it would seem that a strong case can be made for such contention) the injustice of laws which permit combinations to direct their injurious activities at injury of another under such circumstances seems apparent. The employer so circumstanced has done everything that he can to meet union demands. He has finally been placed in the position where he can bargain only with one union and if he bargains with any other union he commits an unfair labor practice. Nevertheless, it was and is asserted that an employer so circumstanced may be subjected to organized concert of action to do him harm, the same as if he were in fact an employer hostile to labor.

Laws which permit any such concert of action under such circumstances obviously show no great concern for the balancing of protectable rights. In the same article Mr. Padway observed as follows:

> "Without the right of minority unions to picket, the following situations become more probable. Let us

assume that the Board has certified an industrial union as the exclusive bargaining agent for a plantwide unit. Let us further assume that the numerically small skilled groups within the plant have, through their opposition to the industrial union, antagonized the leaders of the industrial union. The majority union can in retaliation negotiate a contract that completely ignores the rights of the skilled workers — decrease their wages, increase their hours, and generally remove gains made in conditions of work.

"These groups, victimized by the vindictive attitude of an unsympathetic union, with the help of the employer who stands to gain thereby, would be denied the right to publicize their plight. * * *" National Lawyers Guild Quarterly, Vol. 2, No. 4, Jan. 1940, p. 232.

The court will recognize the counterpart of this argument on pp. 30, 33, 76 and elsewhere in petitioners' brief, except that the argument therein made is placed upon the basis of a constitutional right under the 14th amendment to carry on this bitter union struggle at the expense of employers, employees, workers and the public and regardless of the affect upon these major interests.

If the two largest labor unions in the country cannot trust each other to act in the interests of labor, it does not seem particularly amazing that the legislature in 1939 took cognizance of some of the inequalities under existing laws and decided to place some restriction upon the right to use concert of action to do injury to another.

Under the National Labor Relations Act Title 29, U. S. C. A., Section 158 (3) and Section 159 (a) employer use of an all-union agreement is an unfair labor practice unless

the union in question represents a majority of employees in a collective bargaining unit. The all-union agreement is recognized for what it is; a coercive instrumentality, and its use is regulated.

As the employer is prohibited from coercing with respect to this subject matter, the decision of this Court in *International Association of Machinists, etc. v. National Labor Relations Board*, 311 U. S. 72, 85 L. ed. 5 (1940) was one which anyone might reasonably anticipate. In that case this Court sustained the Labor Board in ordering an employer to cease recognizing an AF of L union that had an all-union agreement with the employer where it did not appear that the union represented an *uncoerced* majority of the employees in an appropriate bargaining unit.

Under the law of Wisconsin prior to the passage of the Employment Peace Act, as already pointed out, an all-union agreement was a legitimate object of a labor union even though it did not represent a majority of the employees in an appropriate collective bargaining unit and even though it did not represent any employees in a collective bargaining unit. This was true even after the passage of the state's Little Wagner Act. *United Shoe Workers, etc. v. Wisconsin Labor Relations Board.*, 227 Wis. 569, 279, N. W. 37 (1938)— It would seem that any legislature at all alive to this situation and having any regard for the balancing of protectable rights might reasonably conclude that employers ought to be protected from concert of action directed at injury to them where the objective sought was one which an employer subject to the jurisdiction of the National Board could not yield to without committing an unfair labor practice.

In *Valley Mould and Iron Corp. v. National Labor Relations Board*, 116 Fed. (2) 760 (Dec. 17, 1940) the Court said:

> "The act was intended to secure and preserve for employees the right to bargain collectively without intimidation, coercion or other improper influence from anybody, *whether it be employer, labor unions or others*. The purpose of the legislation and its proper administration necessitate, upon the part of the employer, the utmost of honest neutrality upon his part. It imposes upon him the duty to realize that his employees are free agents and that he must stand as a neutral party, accepting without reservation their selection of bargaining agent. This neutrality is akin to that of the examiner, the Board and the court. It is not for the Board or the courts to take into their hands the decision of which is the best union for the employees. The whole purpose is to impose upon the employer, the Board and the court, utter neutrality and impartiality. The whole end in view is free, untrammeled, uninfluenced self-determination of a bargaining agent. * * *"

It would seem apparent that as a matter of plain realism there can be no such absolute neutrality on the part of an employer if the laws are such that unions may use all weapons which they customarily use in forcing demands directed at compelling an employer to violate this neutrality. The petitioners claim the right to conduct all such activities in the name of freedom of speech under the 14th amendment.* The argument impresses us as ridiculous,

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*Throughout their brief petitioners attempt to place boycotting upon the same basis as picketing under the 14th amendment. See petitioners' brief pp. 25, 26, 32, 41, 52 and 70.

but if the petitioners do have any such constitutional right, then it would seem that all acts passed in the interests of labor and directed at compelling an employer to take this neutral attitude must fall as violative of the employer's rights under the 5th and 14th amendments.

In *South Atlantic Steamship Company of Delaware v. National Labor Relations Board*, 116 Fed. (2) 480 (Jan. 3, 1941) the employer had a so-called preferential closed-shop agreement with an AF of L union. Some twenty-three members of this union joined a CIO organization. The AF of L union threatened strike unless these twenty-three were discharged and AF of L members employed. The employer was a maritime shipper and the strike would tie up all the employer's ships. There was some evidence that under actual operation the parties had treated the preferential agreement as the equivalent of an all-union agreement. The employer yielded to the demands of the AF of L union. He was adjudged guilty of an unfair labor practice because of these discharges (interferences) without an all-union agreement. See also:

National Labor Relations Board v. Ed Friedrich, Inc., (1941) 116 Fed. (2) 888.

In re Mooremack Gulf Lines, Inc. etc. (Dec. 1940) reported 7 L.R.R., 463, the National Board extended the protection of the Act to strike breakers whom the employer wished to retain but who were discharged by the employer upon demand of the striking union upon reinstatement of striking employees. This was held to be interference. The National Union threatened a sit-down strike unless these employees were discharged. The Board reasoned as follows:

"[Text] 'The existence of the N.M.U.'s pressure upon the respondents to effect the discharge of the complainants with the threat of a series of sit-down strikes is established beyond question. However, the record is equally clear that the complainants were discharged by the respondents because of their membership in the C.T.U. and their refusal to join the A.C.A. when the respondents capitulated to that pressure. As we have heretofore stated, the Act, which is paramount, prohibits such discrimination for union activity without exception predicated upon circumstances or conditions which here induced the discrimination. To hold otherwise would virtually nullify the Act in any situation where rival labor organizations were involved. "It would mean that an employer would be relieved of all obligation under the Act merely upon a showing of pressure and consequent probable loss from one of the rival organizations. The result would be that the rights supposedly guaranteed by the Act, whether of a majority or a minority group, would be at the mercy of an employer and of rival groups in any case where the rival group chose to exert pressure and the employer chose to take advantage of it.' "

The board might well have added,—if the injury of the business threatened was such that the employer yielded rather than suffer same.

The National Board's jurisdiction is limited to that of acting upon the employer when he acts so as to defeat the rights protected under the Act. As a consequence, labor groups may with impunity make demands upon the employer which he may not yield to under the National Act and said groups can and do threaten to bring all of the destructive forces of their combination against an employer

unless he yields to the outlawed demand (outlawed used in the sense that the employer may not yield to it without committing an unfair labor practice under the act.) If the employer purchases peace at the price of yielding to the outlawed demand, he commits an unfair labor practice under the act and the board has the authority to and does order the employer to cease and desist from the unfair labor practice and applies the remedial provisions of the Act. The same situation existed under Wisconsin law prior to the passage of the Employment Peace Act.

Such being the scope of the power of the National Board and the scope and power of the State Board under the Little Wagner Act, it does not seem too surprising that the State has legislated outlawing the demand of the union which the employer may not meet and which, if yielded to, results in the employer committing an unfair labor practice as well as the conduct of the employer which results in defeating the rights sought to be protected by both Acts. The Employment Peace Act makes it an unfair labor practice for a union to make a demand which an employer may not meet and to engage in activities directed to that end as well as making it an unfair labor practice on the part of the employer if he yields to a demand which he may not yield to.

Under all of the situations herein discussed (the situations are illustrative rather than intended as exhaustive) petitioners' argument goes to the length of asserting that freedom of speech under the 14th amendment is an effective barrier against legislative competency to meet or deal with such matters. It is urged that combinations may bring all of their destructive forces to bear against an employer

even though he is helpless to meet the demand and cannot meet it under existing laws.

Is it not perfectly apparent where such concept takes us? It means that the legislature is impotent to deal with the problem of justification for concert of action directed at injury to another and with the combination left free to make its own determination of justification. Freedom of speech meant to preserve democracy becomes the concept by which all other freedoms are destroyed.

4. Facts known to all with respect to the functioning of organized labor.

This Court will take judicial notice of the increasing public awareness of racketeering and of no inconsiderable communistic domination within the organized labor movement. See also R. I, 225, 227, 228, R. II 35. These were matters of legitimate legislative concern.

Unchecked power breeds arrogance, breeds an unyielding attitude not conducive to collective bargaining. This case itself illustrates the point* Unchecked power breeds a "rule or ruin" policy. Again the record in the instant case is illustrative. The unions had contractual relations with the company. They obtained from the arbitration board everything they asked for by way of improved wages, hours and working conditions (the company had not opposed such requests) except an all-union agreement without submitting that issue to the affected employees. The parties

*We set forth a very detailed statement of the facts of this case including the negotiations preceding and the arbitration proceeding. The case is an illustrative object lesson of what unchecked power breeds.

were bound by the arbitration award. The company accepted it. The unions did not. They severed contractual relations and since the inception of the strike have been directing all of their destructive forces against the company to compel it to violate Wisconsin law. The rule or ruin policy which is bred by unchecked power is illustrated in the *Golden Guernsey case (Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers and Dairy Employees' Union, etc.*, 238 Wis. 379 (1941)). The attitude and arrogance which unchecked power breeds is further illustrated by *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323, 82 L. ed. 872 (1938). See statement of facts in the dissenting opinion. Nor did the legislature need to close its eyes to the known facts as to what picketing means in a modern industrial controversy as distinct from advertising the facts of a labor dispute without annoyance or threat of any kind, to the end that there may be free competition of ideas in the open market of public opinion and without which information democracy cannot successfully function (*Thornhill v. State of Ala.* 310 U. S. 88, 84 L. ed. 659 (1940)); as distinct from an appeal to reason by all peaceful means of gaining access to the mind (*Milk Wagon Drivers' Union v. Meadowmoor Dairies*, 312 U. S. 287, 85 L. ed. 497 (Feb. 1941)),—picketing entitled to protection as freedom of speech under the 14th amendment.

Actually and factually, picketing as used in an industrial controversy, far exceeds any such allowable area. It is used as an instrument of perfecting and maintaining a boycott and so enmeshed therewith as to be incapable of separation therefrom. Unions are organized into locals, the locals are affiliated with the State organization and with

central bodies which hold themselves out as being able to secure for any affiliate the cooperation and united action of all affiliated unions and their members, prompt and concerted action of all affiliated unions and their members and the entire numerical strength of the AF of L affiliated unions in the support of and in the attainment of the approved demands and objectives of a contending union or unions.*

A fundamental tenet of AF of L unionism and one of the cornerstones upon which such unionism is based is that of honoring an AF of L picket or pickets. This fundamental concept and rule is usually expressed in terms of "not going through a picket line". One AF of L picket in front of a place of business or establishment is a picket line within the rule and recognized as such by all AF of L union members. This rule creates an arbitrary dead line along the picket's path beyond which no AF of L member dare pass regardless of whatever craft, trade, industry or profession the member may be in and regardless of whether said member of the AF of L union of which he is a member has any dispute with the picketed place of business or employment and regardless of whether said member's employer has any dispute with the picketed place of business or employment. Any AF of L member, regardless of whether said member or the AF of L union, of which he is a member, has any dispute with the picketed place of business or employment and

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*The petitioners in their petition for certiorari supplied this court with an appendix to the reply brief in which is set forth the findings of fact and conclusions of law of the Circuit Court for Milwaukee county in a subsequent contempt action brought to enforce the order of the board in the instant case. The assertions made upon this branch of the argument are not mere assertions. They are facts and they are supported by the trial court's findings of fact in the contempt proceeding. The petitioners in their brief apparently deem it expedient to ignore what picketing actually and factually involves. See finding 7, p. 7; finding 8, p. 9 of petitioners' appendix to reply brief in support of petition for writ of certiorari.

regardless of whether said member's employer has any dispute with the picketed place of business, who disregards this rule of trade unionism and enters the place of business by "crossing the picket line" to himself perform any service for the picketed place of business or to patronize the said place of business or to have any contacts therewith or to perform any service for his employer by way of delivery of goods, wares, merchandise, material, equipment, supplies or the rendition of services, knows that he violates said rule and commits an act of disloyalty to his union, and that he subjects himself, or runs the risk of subjecting himself, to fine, suspension or other disciplinary action by the union of which he is a member. Such disciplinary action may be severe. The rule of not going through the picket line is not a voluntary or optional matter with AF of L members nor is the enforcement of the rule by way of disciplinary action against offenders entirely optional with the various locals affiliated with the Wisconsin State Federation of Labor and the Federated Trades Council of Milwaukee. There is at least a tacit understanding among all locals affiliated with the Federated Trades Council that the rule will be enforced as to all approved strikes.*

Picketing as used by AF of L unions means compulsory "hands off from this place of business" to all members of the organization. It means organized concert of action directed at doing injury to another. It means organized boycott at the sales end of a business. It means concerted effort to prevent or interfere with the receipt of raw materials, products, merchandise or services. That is what one picket

*Finding 18, pp. 16, 17, petitioners' appendix to reply brief in support for petition for writ of certiorari.

(ostensibly advertising the facts of a labor dispute) means actually and factually.

The foregoing is organization for power. It is in no sense an exercise of the constitutional right of freedom of speech. And yet the petitioners herein urge that the legislature is without any power to regulate or curb in any manner the exercise of such power under any circumstances. There obviously can be coercive picketing although it is peaceful in the sense of freedom from physical violence. Picketing, as used by AF of L organizations is never non-coercive. It is the instrument by which a complete boycott is perfected and maintained.

F. Because of the construction placed upon the challenged section by the Supreme Court of Wisconsin, there is no occasion for this Court to consider the Act as a whole for the purpose of examining the extent to which the Act manifests regard for the balancing of rights of all major interests* but even if there is such occasion, it is apparent from an analysis of the Act that it does show a scrupulous legislative regard for the balancing of rights of all major interests.

If the challenged section does involve any constitutional question of reasonable regulation of exercise of the right of free speech (we assert that it does not as it does not regulate within that area), then this Court would have to examine the Act as a whole to determine whether it does manifest care in balancing rights of all major interests for the purpose of determining whether in the light

*The section regulates in area (2) and not in area (3). See p. 53 of this brief.

of all protective provisions the challenged section is a reasonable regulation.

The right of freedom of speech is not an absolute right and is clearly subject to regulation.

Near v. Minn. ex rel Olson, 283 U. S. 697, 75 L. ed. 1357 (1931);

Schenck v. United States, 249 U. S. 47, 39 S. Ct. 247, 63 L. ed. 470 (1919);

Gitlow v. New York, 268 U. S. 652, 45 S. Ct. 625; 69 L. ed. 1138 (1925);

Wisconsin Employment Relations Board v. Fred Rueping L. Co., 228 Wis. 473, 279 N. W. 673 (1938);

Regulation of the right of freedom of speech may be sustained in an act which does manifest care for the balancing of major interests where such regulation could not be sustained in an act which does not manifest such care. This Court specifically recognized such to be true in the *Thornhill case*, when it said:

> "Sec. 344B in question here does not aim specifically at serious encroachments on these interests and does not evidence any such care in balancing these rights against the interest of the community and that of the individual in freedom of discussion on matters of public concern."

There can never be a balancing of protectable rights or any regulation of constitutional rights without circumscribing in some degree the absolute exercise of the right

regulated. *Minersville School District et al v. Gobitis*, 310 U. S. 586, 60 S. Ct. 1010, 84 L. ed. 1375.

We cannot see wherein the challenged section, in the light of the State Supreme Court's interpretation of it, even attempts to regulate conduct which falls within the area of exercise of the constitutional right of freedom of speech. If the challenged section, as construed, touches even incidentally the area of exercise of the right of freedom of speech, it would seem that any conceivable regulation involved in that area is of insignificant import when compared to the regulation sustained by this Court in the field of freedom of religious worship in the *Gobitis case*. The Gobitis children were obliged to surrender their religious principles or forfeit the right to attend the public schools. The decision is grounded upon the basis of a great constitutional concept coming in conflict with the great concept of national unity (peace time national unity). There obviously was a clash between two great concepts. If there is a conceivable clash in the case at bar it must be a clash between the power of the State to control violent, intimidating or coercive means as opposed to freedom of speech absorbing such power.

1. Analysis of the scope, purposes and provisions of the Employment Peace Act.

It is apparent from an examination of the act that it is designed to meet many of the problems which arose under prior State laws as well as problems which arose out of the Congress enacting the National Labor Relations Act. Some of these problems have been adverted to and discussed, pp. 74-93 of this brief. The problems were real and substantial.

The Act is narrowly drawn and permits both the board and the courts (like the National Labor Relations Act) to deal with each individual case upon the factual situation presented by that case. The act is a sincere legislative effort to balance the rights of all major interests in industrial strife.

The purpose of the act is set forth in the declaration of policy, sec. 111.01 of the Act. Sec. 111.01 (1) recognizes that there are three major interests involved in employment relations, namely: the public, the employee and the employer, all of which interests are interrelated. The purpose and policy of the state is to protect and promote each of these interests with due regard to the situation and the rights of the others.

The Act, by sec. 111.01 (2) recognizes that industrial peace, regular and adequate income for the employee and uninterrupted production of goods and services are promotive of all of these interests and that they are largely dependent upon the maintenance of fair, friendly and mutually satisfactory employment relations and the availability of suitable machinery for the peaceful adjustment of whatever controversies may arise.

The Act recognizes by sec. 111.01 (3) that negotiations of terms and conditions of work should result from voluntary agreement by the employer and employees; for purposes of such negotiations an employee has the right, "if he desires, to associate with others in organizing and bargaining collectively through representatives of his own choosing, without intimidation or coercion from any source."

Sec. 111.01 (4), in its declaration of policy provides:

> "(4) It is the policy of the state, in order to preserve and promote the interests of the public, the employe, and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated.
>
> "While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat."

The Act, by sec. 111.02, sets up comprehensive definitions for the purposes of administering the Act.

Subsec. (1) of this section defines the term "person", subsec. (2) defines the term "employer", subsec. (3) defines the term "employee", subsec. (4) defines the term "representative", subsec. (5) defines the term "collective bargaining". Subsec. (5) reads:

> " 'Collective bargaining' is the negotiating by an employer and a majority of his employes in a collective bargaining unit (or their representatives) concerning representation or terms and conditions of employment of such employes in a mutually genuine effort to reach

an agreement with reference to the subject under negotiation."

Subsec. (6) defines the term "collective bargaining unit". This subsec. reads:

> "The term 'collective bargaining unit' shall mean all of the employes of one employer (employed within the state), except that where a majority of such employes engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in section 111.05 (2) to constitute such group a separate bargaining unit they shall be so considered. Two or more collective bargaining units may bargain collectively through the same representative where a majority of the employes in each separate unit shall have voted by secret ballot as provided in section 111.05 (2) so to do."

It will be noted that these collective bargaining units are made very elastic and that the affected employees themselves determine bargaining units. The fears which Mr. Padway expressed in the article in the National Lawyers Guild (see p. 83 of this brief) and the same fear expressed in petitioners' brief in this Court, pp. 30, 33-76) is of minor consequence under the Wisconsin Act. Every opportunity is given to the employees themselves to form, join and demand recognition as craft units. The act is much more carefully drawn to protect the right of minorities in selecting their own units and to protect minority collective bargaining than is the National Act. See *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401, 60 S. Ct. 300, 84 L. ed. 347 (1940). The declared policy of the National Act (sec. 1) among other things

is that of "protecting the exercise by workers of full freedom of association, self-organization and designation of representatives *of their own choosing* for purposes of collective bargaining." It might be a trifle difficult to convince the AF of L members involved in the cited case that the act does protect such right. The Wisconsin Act is designed to make the concept real.

Continuing with the definitions found in the Act, subsec. (7) defines the term "unfair labor practice" to mean any unfair labor practice defined in sec. 111.06.

Subsec. (8) defines the term "labor dispute" as follows:

> "The term 'labor dispute' means any controversy between an employer and the majority of his employes in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute."

Subsec. (9) defines the term "all union agreement." The definition is the accepted meaning of said term.

Subsec. (10) defines the term "board" to mean the board is created by sec. 111.03.

Subsec. (11) defines the term "election" and subsec. (12) defines the term "secondary boycott".

Sec. 111.03 creates the administrative board.

Sec. 111.04 provides:

> "Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful con-

certed activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities."*

Sec. 111.05 provides for representatives and elections. Subsec. (1) provides:

"Representatives chosen for the purposes of collective bargaining by a majority of the employes voting in a collective bargaining unit shall be the exclusive representatives of all of the employes in such unit for the purposes of collective bargaining, provided that any individual employe or any minority group of employes in any collective bargaining unit shall have the right at any time to present grievances to their employer in person or through representatives of their own choosing, and the employer shall confer with them in relation thereto."

Subsec. (2) provides for the board's holding elections to determine questions of collective bargaining units. The board is not given any power to select bargaining units for

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*This is the same policy set forth in the Norris-LaGuardia Act, U.S.C.A., Tit. 29, sec. 102 insofar as material, provides:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, **though he should be free to decline to associate with his fellows,** it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted." (Bold type ours)

employees. In this respect the Act differs from the National Act.

Subsec. (3) provides for secret ballot elections conducted by the board for employees in appropriate collective bargaining units to determine their collective bargaining representatives. Questions concerning certification of the results of elections are open to review in the courts in the same manner that the board's orders with respect to unfair labor practices are open to review. (See sec. 111.05 (3)).

Sec. 111.06 is the section with respect to unfair labor practices. Subsec. (1) sets up employer unfair labor practices. These provisions in the main follow the provisions of the National Act. There are added provisions not found in the National Act. For instance, subsec. (j) makes it an unfair labor practice for an employer

> "To employ any person to spy upon employees or their representatives respecting their exercise of any right created or approved by this chapter."

and subsec. (k) makes it an unfair labor practice for an employer

> "To make, circulate or cause to be circulated a blacklist as described in section 343.682."

Subsec. (1) (c) of sec. 111.06 provides that it shall be an unfair labor practice for an employer

> "To encourage or discourage membership in any labor organization * * * by discrimination in regard to hiring, tenure or other terms or conditions of employment; provided, that an employer shall not be prohibited from entering into an all-union agreement with

the representatives of his employees in a collective bargaining unit, where three-quarters or more of the employees in such collective bargaining unit shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the board. * * *"

If a union having such an agreement unreasonably refuses to receive as a member any employee of such employer the board shall declare the agreement terminated.

Subsec. (e) makes it an unfair labor practice for an employer to enter into an all-union agreement except in the manner provided in subsec. (1) (c) above quoted. Aside from the secret referendum ballot features of this provision and aside from the provision requiring three quarters approval rather than majority approval, the provision is similar to the provisions of the National Act, which prohibits all-union agreements with a union unless the union represents a majority of employees in an appropriate collective bargaining unit. See pp. 83-84 of this brief.

These provisions with respect to the all-union agreement are the only provisions of the entire act which are not grounded upon the principle of majority rule in a collective bargaining unit. Majority rule in a collective bargaining unit is the very foundation and cornerstone upon which the structure of the principle of collective bargaining is erected. It is a principle without which there can be no collective bargaining.*

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*The petitioners assert (p. 35 of their brief) that the supreme court of **Oregon in American Federation of Labor v. Bain,** 106 P. (2) 544 overthrew a statute similar in structure to that of the Employment Peace Act and assert that the statute involved in the Oregon case was grounded upon majority vote in appropriate collective bargaining units. The Oregon statute overthrown in that case made no provision at all for appropriate collective bargaining units. That

Subsec. (2), (a) to (j) inclusive of sec. 111.06, sets up employee unfair labor practices. From an examination of these various subdivisions of the statutes it is apparent that what the legislature strove for in enacting these provisions was that of giving the board power to prevent workers from inflicting economic loss upon employers and employees when the object of the workers was that of compelling or coercing employers to violate the neutrality required of them with respect to collective bargaining both under the National Act and under the State law or where the object was that of *compelling* or *coercing* employees with respect to joining organizations not of their own choosing for purposes of collective bargaining.

Note that subsec. (3) of sec. 111.06 provides as follows:

> "It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employes, or in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by subsections (1) and (2) of this section."

Beyond this and in the main, employee unfair labor practices which are outlawed by subsec. (2) are practices which are recognized as unlawful conduct in any civilized society. Subsec. (e) is the challenged section. Here again, the principle adopted by the legislature to determine whether the conditions which prevail in an employment are such as to warrant concerted coercive instrumentalities to be directed against the employer to his injury and con-

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fact alone would be sufficient to distinguish the Oregon statute overthrown from the Employment Peace Act. Further, the statute was construed to prohibit minorities from picketing even though the picketing was not violent, intimidating or coercive in character.

sequent injury to his employees is that of majority rule within an appropriate collective bargaining unit. This section is obviously aimed at democratic functioning of collective bargaining units and against autocratic and arbitrary control of such units by those in power in the labor movement and who incline toward the exercise of such autocratic control. Neither history nor current events would sustain any assertion that the legislature had nothing to fear in this direction. The section also aims to protect the industry of the State fro museless, needless and unjustifiable injury when the cause of the dispute is unsubstantial. No one can determine that question better than the employees themselves in an appropriate collective bargaining unit. They determine such question upon the basis of their own self interest.

Sec. 111.07 provides the procedure for presenting unfair labor practices to the board and confers sufficient power upon the board with respect to issuing subpoenaes, etc. to permit it to function effectively as an administrative agency. Subsec. (7) of said section provides for the enforcement of its order by the board where the order is not obeyed. The enforcement proceedings are in the Circuit Courts throughout the State. With respect to the power of the Circuit Court in the enforcement proceedings this section, among other things, provides:

> "* * * Upon such hearing the court may confirm, modify, or set aside the order of the board and enter an appropriate decree."

This subsection makes provision for the Circuit Court granting leave to adduce additional evidence where such evidence appears to be material and reasonable cause is

shown for failure to adduce such evidence in the hearing before the board. The taking of the additional evidence is before the board and the board may then modify its findings of fact or make new findings by reason of the adduction of additional evidence. The subsection further provides that the judgment and decree of the Circuit Court shall be subject to review by the Supreme Court.

Subsec. (8) of said section makes provision for any aggrieved party commencing an action for review in the circuit court of any order of the board. The proceedings upon such a review are the same as proceedings brought by the board to enforce its order under the preceding subsection.

Sec. 111.15, already adverted to, provides as follows:

> "Except as specifically provided in this chapter, nothing therein shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work; nor shall anything in this chapter be so construed as to invade unlawfully the right to freedom of speech. And nothing in this chapter shall be so construed or applied as to deprive any employe of any employment benefit which he might otherwise be entitled to receive under chapter 108 of the statutes."

Both the board and the courts are enjoined by the express language of this provision from applying any section of the Act so as to invade the constitutional right of freedom of speech. Both the board and the courts deal with conduct upon the basis of the factual situation presented in each particular case. Both the orders of the board and the decrees of the court are adjusted to the particular facts

of the particular case. Both the board and the courts "deal with controversies through the concreteness of individual litigation rather than through the abstraction of a general law." Milk Drivers' Union v. Meadowmoor Dairies, 312 U. S. 287, 85 L. ed. 497 (Feb., 1941).

Sec. 111.08 provides for collective bargaining agencies making financial reports to those whom they represent. Sec. 111.10 provides for arbitration and sec. 111.11 provides for mediation.

This is the act which petitioners characterize (petitioners' brief, p. 22) as "an employee slavery act" and with respect to which the legislature, the board and the Courts are charged with having sought to impose upon the workers of the State an involuntary condition of servitude and with seeking to deny to the workers of the state their constitutional rights.

A major difficulty with labor today is that it wants recognition of the right of collective bargaining and it wants agencies, state and national, to protect and foster that right. It has struggled for recognition of the collective bargaining process. It has obtained recognition and protection, both nationally and in the State of Wisconsin, with respect to that process. It has obtained agencies, both nationally and in the State of Wisconsin to foster and protect this right. It wants to obtain all of the benefits from the collective bargaining process. Having obtained this recognition, it now seeks to repudiate all responsibilities that are entailed with respect to the fostering and protecting of that right. It wishes to have the law such (it asserts that constitutionally it must be such) that short of actual violence or threats thereof it can direct all of the coercive and

destructive forces of its tremendous organization against an employer to compel him to meet demands which he cannot meet under the very acts set up to foster and protect the collective bargaining right. Labor, through its spokesman, is instantly resentful at any mild legislative effort to make it accept the responsibilities that go with national and state agencies that have been set up to foster and protect the collective bargaining process.

With respect to sec. 111.06 (2) (e) (the challenged section) the Wisconsin legislature has in substance said to labor: We recognize your right to organize and bargain collectively and we will protect you in that right free from any interference or domination on the part of the employer, which interference or domination we have condemned as employer unfair labor practices. Under such circumstances, there is no justification for lawlessness, no justification for concert of action directed at injury to another by use of coercive measures merely because you claim that the end sought is a justifiable union end. There are obvious situations where the harm that you do an employer and his employees by employing concerted coercive measures so outweighs any union justification as to demand that the employer be free from injury which he suffers from your concerted coercive activities directed at injuring him. Such a situation exists when there is no substantial labor dispute. You shall have freedom to publicize the facts with respect to any labor controversy and shall have full freedom to exercise all rights of freedom of speech guaranteed under the 14th amendment, but you may not concert and use coercive measures or coercive picketing, boycotting or other overt concomitants of a strike beyond freedom of speech

guaranteed by the constitution unless the majority of employees in a collective bargaining unit of an employer, against whom such acts are primarily directed, have voted by secret ballot in favor of a strike.

We are giving you every facility for organizing in collective bargaining units by making those units just as elastic as we can make them. Sec. 111.02 (6), Stats. Your right is not the only right involved in industrial controversies. The employer has rights which we have likewise tried to protect. The public is interested in the protection of all of these primary rights, including the rights of employees not to be forced to join a labor organization if they deem it against their interests to join. In this act, we have given consideration to all rights, those of the public, the employee and the employer and we have set up an administrative agency for the protection and enforcement of all such rights.

The legislature has further said: If, with all the facility we have given you for purposes of organizing and bargaining collectively, if, with all the facility that we have given you with respect to ability to organize into units of collective bargaining, units which the employees themselves want (sec. 111.02 (6), Stats.), you are unable to make your views prevail through the ordinary methods of persuasion to a point where you have convinced a majority of employees in a collective bargaining unit that they have a substantial dispute with their employer, the public interest and the welfare of industry with which the public is concerned requires that the employer so circumstanced be not subjected to concerted coercive action directed at injuring him.

The legislature has said that combination and concert

of action directed at the injury of another by the use of coercive instrumentalities to effect such injury under such circumstances is prohibited conduct as the damage that flows therefrom to other rights equally entitled to protection far outweighs any benefit that labor may receive from such conduct in the light of all of the other provisions of the act designed to protect labor in the exercise of the right of collective bargaining.

G. Reply to specific arguments of the petitioners not heretofore covered.

1. The challenged section is not violative of the 14th amendment because of a threat or a fear of subsequent punishment with respect to the exercise of the right of free speech. The section can be no more subject to constitutional attack in this respect than the National Labor Relations Act.

On pp. 55-56 of their brief petitioners contend that the challenged section is violative of the 14th amendment in relation to freedom of speech because of the threat or fear of subsequent punishment which abridges or diminishes the free or effective exercise of that right. The same argument can be made with equal force with respect to lack of legislative power to deal with either civil or criminal libel, duress or frauds or to deal with intimidating or coercive conduct. Under the construction placed upon the section by the Supreme Court of the State, the board and the courts are charged with the duty of determining under the factual situation of each case and as a question of fact whether the overt concomitants of a strike are coercive. If they are

coercive they are proscribed activities. If not, they are not.

The merit of petitioners' argument may be further tested by applying the argument as a test of the constitutionality of the National Labor Relations Act.

In dealing with the problem of what constitutes coercion and interference on the part of an employer the Supreme Court of Wisconsin took a constitutional approach to the employer's right of freedom of speech in *Wisconsin Labor Relations Board v. Fred Rueping L. Co.*, 228 Wis. 473, 495-496. That court quoted with approval language in *Texas & New Orleans R. Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 568, 50 Sup. Ct. 427, 74 L. ed. 1034, and then used the following language:

> "There is little to add to the foregoing analysis. The right of free speech has never been considered to make impossible civil remedies or criminal prosecutions for libel, duress, or fraud, although speech was the agency in each case. The distinction between the exercise by an employer of his right of freedom of speech and the actual use of the spoken word as an instrumentality to overpower the will of employees is well understood, and constitutes the dividing line between what an employer may do and what he may not do. It may, of course, be difficult to determine in a particular case on which side of the line the activities of a particular employer fall, but this must be left to the trier of fact if there is room for conflicting inferences. * * *"

In dealing with the same problem the National Labor Relations Board, while perhaps recognizing the constitutional dividing line as a concept, in application of the con-

cept, literally denied employers all right to express any opinion. The *Ford case* is illustrative.*

The board's application of the concept is well summarized in the supplement to the Labor Relations Reporter for October 14, 1940, Vol. VII, No. 7, as follows: (p. 4)

> "The Labor Board, although asserting recognition of the constitutional rights of employers to freedom of speech, has constantly decided its cases on grounds which *in actual effect* so limit the right that any real use of it in respect to unionization of their own employees would be practically impossible.
>
> "The theory under which the Board reaches this result is that an employer's freedom of speech is a right which may be 'qualified'; that the Wagner Act does impose qualifications upon its exercise; and that, because of the employer's 'superior economic power,' *any* expression to employees of hostility to unionism or preference for one union over another is necessarily 'coercive' and therefore constitutes unlawful 'interference' by the employer."

The board in its application of the concept literally denied employers all freedom of expression. The employer had the right to express, but any time he expressed he *ipso facto* committed an unfair labor practice. The Board's strategy in the *Ford case* and the manner in which that strategy boomeranged is further analyzed in the Labor Relations Reporter supplement above referred to as follows: (p. 4).

> "The strategy of the Labor Board's argument before the Circuit Court of Appeals in the present case back-

*National Labor Relations Board v. Ford Motor Co., 114 F. (2) 905 (1940).

fired in a peculiar manner. Instead of pressing the theory upon which its decisions are often based—that *any* expression to employees by the employer of hostility to the union is necessarily coercive, and therefore *in and of itself* an unfair labor practice—the Board, apparently to avoid any chance of losing the particular case upon the appeal, took the much less extreme position that the expressions of the employer amounted to coercion in this case because of the *manner of expression.*

"When, therefore, the decision on appeal went against the Board on the free speech issue, although it won on all other issues, the Board not only lost that aspect of the particular case, but evoked from the court such a specific ruling on the permissible manner of expressing opinion as practically to inform all other employers that they have a constitutional right to communicate their opinions to the employees by printing pamphlets and handing them to each employee individually. * * *"

The obvious answer is that the fact that the Board *may* unconstitutionally apply certain provisions of an act so as to deny freedom of speech does not militate against the constitutionality of the act itself. Presumably, the courts will check any such Board attempt to apply the act in an unconstitutional manner.

It is idle to assert that employers know with any degree of certainty how far they may go in expressing opinions,—know with any degree of certainty whether they will be penalized for exercising what they consider to be exercise of the constitutional right of "freedom of speech". If, in the expression of an opinion, the character of the act is susceptible of being deemed coercive for an outlawed

purpose when weighed in the light of all of the facts and circumstances of the case, the employer can be and is ordered to cease and desist therefrom in the broadest conceivable language. The orders of the board as enforced by the decrees of the courts are enforceable the same as the orders of the Wisconsin Employment Relations Board as enforced by the decrees of the courts of the State. It may be and is difficult in many instances to determine whether an expression of ideas or opinion by an employer, under all the facts and circumstances of a case, is or is not coercive. That does not militate against the constitutionality of the National Labor Relations Act and for like reason it cannot militate against the constitutionality of the challenged section of the Wisconsin Employment Peace Act. The petitioners live under the same constitution as do employers of labor.

It is asserted by petitioners (p. 64):

> "* * * that, as a result of being found guilty of unfair labor practices, employees lose their status of employees under the act and are consequently deprived of the rights, privileges and immunities afforded by the act to other employees (sec. 111.02 (3) and 111.07 (4)). Gone is the right to vote, participate in the designation of representatives and to be protected from discharge because of union activity or affiliation. * * *"

Any such point was not particularly involved in this case when the case was argued and briefed in the Supreme Court and the Court had no occasion to give full consideration to the subject. The Court expressly repudiated any such construction of the act in the subsequent case of *Allen-Bradley Local 1111, v. Wisconsin Employment Rela-*

tions Board, 237 Wis. 164, 295 N. W. 791 (1941), in which case the point was involved and fully argued.*

2. The Wisconsin Court's use of the term "coercion" is not inexact or inaccurate.

The petitioners assert: (p. 72)

"We gather from the use of the term 'coerce' in the above respect that the Wisconsin court classified picketing, boycotting, or any other similar overt concomitant of a strike as being coercive per se. Either that, or the Court has said that such action by a minority group constitutes coercion, while such action when

*In the **Allen-Bradley case**, above cited, the court said:

"One of the principal contentions of appellants here is that fourteen strikers who were found guilty of unfair labor practices (acts of violence and coercion) are, under the terms of the National Labor Relations Act, still employees of the Allen-Bradley Company; that because of the finding of the Wisconsin Employment Relations Board that the employees were guilty of an unfair labor practice, that relationship is severed, consequently there must be a conflict between state and federal authority. There are two answers to this contention, first; the National Labor Relations Act has never been applied to the labor dispute here under consideration; second, a mere finding of the Wisconsin Employment Relations Board does not affect the employer and the employee relationship. Appellants' contention is based upon sec. 111.02 (3) of the Wisconsin Employment Peace Act. That part which is material is as follows:

'The term "employee" shall include any person, other than an independent contractor, working for another for hire in the state of Wisconsin in a non-executive or nonsupervisory capacity, and shall not be limited to the employees of a particular employer unless the context clearly indicates otherwise; and shall include any individual .... (b) who has not been found to have committed or to have been a party to any unfair labor practice hereunder.'

"Considering the language of this section by itself, it may warrant the interpretation put upon it by appellants, that is, that a mere finding is sufficient to deprive the employee of his status. However, when considered in connection with other provisions of the act, we think it cannot be so interpreted. That part of sec. 111.07 (4), Wis. Stats. 1939, which is material here, is as follows:

'Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend his rights, immunities, privileges or remedies granted or afforded by this chapter for not more than one year, and require him to take such affirmative action, including reinstatement of employees with or without pay, **as the board may deem proper.**'

"The continuation of the status of an employer is certainly a right or privilege. The act specifically provides how it shall be terminated, that is, by order of the board." (p. 181)

'licensed' or 'authorized' by a majority group does not constitute coercion."

The argument assumes as a premise upon which the analysis is grounded that minorities can never engage in coercive picketing. The premise is obviously false. Both minorities and majorities can engage in coercive picketing when the law sanctions same. Many matters sanctioned by the State Labor Code and the Norris La-Guardia act are obviously coercive but they are recognized as legal coercion under the acts in question. Picketing enmeshed with boycott (such as is described on pp. 90-93 of this brief) is obviously coercion but it has generally been recognized as legal coercion under such acts. It is not legal coercion under the Employment Peace Act when engaged in contrary to the provisions of the challenged section. Employees, workers and unions by concert of action may engage in such legal coercion under this section if there is a favorable strike vote taken pursuant to the terms of the section.* Neither majorities nor minorities may engage in such coercive picketing if they choose to disregard the provisions of the challenged section, as did the petitioners in the instant case. That type of picketing is not an exercise of freedom of speech. It is an exercise of power.

It is hardly necessary to point out that most of petitioners' arguments criticizing the validity of the challenged section are grounded upon a construction of the section repudiated by the Wisconsin Supreme Court. The petitioners' arguments are therefore beside the point. See for instance petitioners' brief, pp. 56, 57, 70, 71 and 76.

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*While the section relates to means, object must loom large in many cases involving its application.

POINT II

Sec. 111.06 (2) (e) is not violative of the 14th amendment to the constitution of the United States as denying to petitioners the equal protection of the laws.

A. Petitioners' argument contra is grounded upon repudiation of the principle upon which the whole structure of collective bargaining is rested.

Throughout the centuries labor has struggled for recognition of the principle of its right to organize and bargain collectively. The very foundation rock and cornerstone principle upon which the collective bargaining structure is erected is that of majority rule within an appropriate collective bargaining unit. Without recognition of such principle the entire structure of the collective bargaining system is without foundation or base. The system necessarily results in majorities speaking for and binding minorities. As was said by the Wisconsin Supreme Court in this case, "This principle is explicit in the National Labor Relations Act, in the Railway Labor Peace Act and in the act now under consideration." (R. II 60).

See: *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515, 81 L. ed. 789 (1937);

National L. R. Bd. v. Jones & Laughlin S. Corp., 301 U. S. 1, 81 L. ed. 893, 108 A.L.R. 1352 (1937).

In their argument upon this branch of the case the petitioners seek to repudiate and destroy the very cornerstone principle upon which the whole system of collective bar-

gaining is erected (see petitioners' argument, top of p. 61, and bottom of p. 37).

In the last analysis petitioners' argument is nothing less than a repudiation of all responsibilities which go with recognition of the right to bargain collectively. The petitioners' argument in essence is that majority rule within an appropriate collective bargaining unit is constitutional classification for purposes of conferring benefits upon labor. It is unconstitutional classification for purposes of making labor accept some responsibility in relation to the benefits conferred.

Petitioners urge that they are denied the equal protection of the laws under the 14th amendment unless short of actual violence and physical destruction of property or threats thereof they are permitted by concert of action to coerce conduct of others in accordance with their wishes and even though this is contrary to the wishes of the majority in an appropriate collective bargaining unit. As even a majority in an appropriate collective bargaining unit is not entitled to use violence or to resort to physical destruction of property or threaten same, it is apparent where petitioners' argument takes us. They claim to have the constitutional right beyond legislative power of control or regulation to direct all of the coercive and destructive forces of their organization, designed to compel and coerce action of others in accordance with their wishes *under any and all circumstances.*

If the strike is authorized by a majority in a collective bargaining unit and for a lawful object and the majority is permitted to use coercive weapons such as boycott and to use picketing as an instrument of perfecting and enforc-

ing that boycott (actually and factually what picketing is as used by AF of L unions), a minority must have the constitutional right to use all such coercive weapons (so petitioners argue) or they are denied the equal protection of the law.

Petitioners' argument is not only grounded upon repudiation of all responsibilities that go with recognition of the principle of collective bargaining, it also assumes as a premise that there can be no such thing as coercive picketing. There obviously can be. On p. 35 of petitioners' brief a question is posed as follows:

> "The question before discussed again presents itself—what is there inherent in the mere taking of a vote, or the failure to take a vote or the acquiescence by a majority to strike, which in the one instance presupposes that the picketing will not present a clear and present danger to the lives and property of citizens, and which, in the other instances, assumes that such clear and present danger will arise in every case of peaceful picketing?"

Such argument and similar argument (see pp. 69-71, petitioners' brief) with respect to unconstitutional classification because power cannot be granted to a majority to license a minority to exercise the constitutional right of freedom of speech is all beside the point. It is grounded upon a construction of sec. 111.06 (2) (e) repudiated by the Supreme Court of th State. The majority in a collective bargaining unit obviously does not determine whether a minority may exercise the right of freedom of speech. What the majority does do is to determine whether the conditions that prevail in their employment are such that coer-

cive instrumentalities directed at injury of another by concert of action ought or ought not to be used to remedy them,—whether the conditions that prevail are such as to justify such intentional injury. This determination is made upon the basis of the self interest of the affected employees, —the only practicable method whereby the legislature can determine such question. A determination of that question has nothing to do with the exercise of freedom of speech. It does have something to do with unjustifiable injury of another by combinations by use of coercion and the infliction of intentional injury by such use.

As to the supposed analogy of petitioners' situation to that of Republican voters after the last election (petitioners' brief, p. 37), it is obvious that the argument is grounded upon a construction of the challenged section repudiated by the Supreme Court of the State. It need hardly be argued that Republicans do not have a constitutional right to concert among themselves to deny all business contacts of every kind to all Democrats; to refuse to permit performance of any service of any kind by a Republican for a Democrat; to penalize by ostracism, fine, suspension or expulsion any Republican who does either the one or the other and to employ speech as the instrument by which this sort of conduct is perfected and enforced. Republicans do not have a constitutional right to concert to *coerce* Democrats to become Republicans or vice versa. Petitioners, like Democrats or Republicans, have a right to submit their ideas to the public so long as they are directed to a lawful object. The ideas must win recognition in the open market of public opinion. Petitioners have no constitutional right to *compel* acceptance of their ideas by coercion.

The one is freedom of speech—the other is freedom of compulsion. The one is guaranteed by the constitution. The other, if beyond the power of the legislature to regulate, destroys it.

B. The classification is entirely similar to that of the National Labor Relations Act.

The National Labor Relations Act recognizes the all-union agreement for what it is, namely a coercive instrumentality with respect to workers. The act permits the all-union agreement with a labor organization only where the organization is the representative of a majority of employees in an appropriate collective bargaining unit and then only where that organization does in fact represent an uncoerced majority.

Title 29 U. S. C. A., sec. 158 (3) and sec. 159 (a);

See also: *International Assoc. of Machinists, Tool & Dye Makers Lodge No. 35, etc. v. National L. R. Bd.*, 311 U. S. 72, 85 L. ed. 5, 61 S. Ct. 83 (1940);

National L. R. Bd. v. Jones and Laughlin S. Corp., 301 U. S. 1, 81 L. ed. 893 (1937);

Consolidated Edison Co. v. National L. R. Bd., 305 U. S. 197, 59 S. Ct. 206, 83 L. ed. 126 (1938).

If it is within the power of Congress to say that the minority of employees in a collective bargaining unit may be coerced by the employer into joining a union by the use of the all-union agreement, providing said union represents an uncoerced majority of employees in a collective bargaining unit in the field of labor relations, no good reason is per-

ceived why the State Legislature may not use the same majority method for determining whether the conditions which prevail in their employment are such that coercive instrumentalities directed at injury of another by concert of action ought or ought not to be used to remedy them,—whether the conditions that prevail are such as to justify such intentional injury.

Conceding legislative power to protect against concerted action directed at unreasonable injury of trade and unreasonable restraints thereof; conceding legislative power to legislate in the interests of industrial peace, regular and adequate income for the employee and in the uninterrupted production of goods and services; conceding legislative power to control concert of action to the end that it does not destroy or seriously hamper or impede government in its attempts to solve unemployment problems; conceding legislative power to balance protectable rights in the field of industrial relations to promote the peace, morals, health, good order and general welfare of the people as a whole, all of which must be conceded, it is difficult to perceive how any classification could be more germane to the objectives sought to be accomplished by the Act than that of a classification based upon the foundation principle of the collective bargaining process namely, that of majority rule within an appropriate collective bargaining unit.

POINT III

The order of the board, sustained and enforced by the courts of the State does not invade petitioners' constitutional right of freedom of speech under the 14th amendment.

A. The picketing at or near the hotels was set in a background of violence, force, fear, intimidation and coercion—the case is ruled by the Meadowmoor case.*

There is no point in repeating here the background of force, violence, intimidation and coercion which characterized the entire campaign of petitioners directed against the company as these facts are very fully set forth in our statements of facts (see pp. 14-27 this brief). The picketing that was conducted *at* or *near* the hotels was not a mere appeal to reason in any sense of the term. It was mass picketing with 75 or 80 pickets thrown about all entrances to the hotels. The picketing was characterized by repeated threats of violence, by actual violence, by the prevention by force and threats of prevention by force of delivery of products and essential services to and from and for the hotels and the prevention by force and threats of prevention by force of the rendition of necessary services to the guests of the hotels by employees of the hotels. Guests of the hotels were booed, sneered at, jeered and hooted. The same applies to members of the Business Institute of Milwaukee occupying under lease some nine rooms of space in the hotel, to the teachers of said Institute and the students who attended the Institute.

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*Milk Wagon Drivers Union, etc. v. Meadowmoor Dairies, Inc., 61 S. Ct. 552, 85 L. ed. 497 (Feb., 1941)

All of the foregoing was directed by the responsible officers of the unions. These responsible officers engaged in violence themselves, led the violence and led in the threats made. The union in most instances, provided bail, provided counsel fees and paid the fines of the members who were arrested and fined for the violence engaged in.*

The entire conduct of the strike *at or near* the hotels was that of a continuously coercive thrust directed at compelling the company to do that which it could not do under the State law, namely enter into an all-union agreement contract with petitioners contrary to the provisions of sec. 111.06 (1) (c) and (e) of the Act. The acts of violence, force, intimidation and coercion were neither "episodic nor isolated." Such acts were all part of a continuously threatening, intimidating and coercive thrust,—they were all part of a continuous manifestation of force directed at compelling action agreeable to the demands of the unions engaged in such manifestations. In spite of the city of Milwaukee's stationing six police officers at the hotel each day for the purpose of maintaining order, order was not maintained, much less a campaign of intimidation and coercion prevented.

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*Petitioners in their brief, p. 50 make a sympathetic appeal to the effect that human experience aptly demonstrates that a few fugitive encounters on the picket line in the early stages of the strike can no more be controlled or prevented by responsible leaders of organized labor than can the sun be stopped in its course. It is asserted that the intensity of emotion, the livelihood that is at stake, the desire to protect a job for oneself and one's dependents, all inject into strikes and picketing such elements that must of necessity in some cases and in the early days of a strike, lead to spontaneous eruption. It is not perceived wherein such sympathetic appeal is at all apposite to the facts of the instant case. The responsible officers in active charge of the strike and in active charge of the conduct on the picket line, themselves promoted, engaged in and were the ring leaders in the lawless conduct. Further, the strike did not involve any struggle for betterment of wages, hours or working conditions. The involved petitioners adamantly refused to permit the employees of the company to have anything to say about whether they should be compelled to be members of the petitioning unions as a condition of employment.

As a matter of fact any peaceful picketing that there may have been in the case at bar was much more enmeshed with a campaign of violence, intimidation and coercion than was the picketing in the *Meadowmoor case*. So far as the report of the *Meadowmoor case* shows, the picketing itself was at least peaceful and was not threatening. There were contemporaneous violent occurrences, or what this Court construed as contemporaneous violent occurrences, which formed the *background* of the peaceful picketing. In the instant case, it is not a mere matter of *contemporaneous background* as such. There was a continuous enmeshment by the pickets themselves and by the responsible officers of the unions conducting this picketing with acts of violence, intimidation and coercion. The clear result was a continuously threatening, intimidating and coercive campaign.

B. The order was narrowly adjusted to the factual situation presented to the board and dealt with by the courts of the state—the petitioners were not prohibited from picketing any place except at or near the hotels.

The order required that the petitioning unions (naming them), the officers, members, agents, successors and assigns of each shall (R. I 261)

"1. Immediately cease and desist from:

(a) Engaging in promoting or inducing picketing *at or near* the Plankinton House or the Kilbourn Hotel;

(b) Attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of the Plankinton House Company;

(c) Boycotting in any way the Plankinton House Company." (Italics ours)

This order is narrowly drawn and adjusted to the factual situation dealt with by the board and by the courts of the State. The order cannot possibly be construed as prohibiting picketing or as prohibiting advertising the facts of a labor dispute at any place except *at* or *near* the hotels, the place where, as before stated, the violent, intimidating and coercive campaign had been and was being waged by the responsible officers of the unions and all in spite of police protection. Under the circumstances, neither the board nor the courts had to rely upon a policeman's club as the sole means of preventing further conduct of the kind and character indulged in by the petitioners,—of the kind and character instigated and led by the responsible officers and agents of the petitioning unions, or as the sole means of counteracting the coercive effect of such conduct. The policeman's club had proved ineffective for either purpose. To deny to the board or to the courts of the state power to enter an order such as the one in question would be to deny to both the board and the courts the power to deal effectively with fear engendered by a blitzkrieg intended to engender fear,—calculated to compel and engaged in for the obvious purpose of compelling conduct through fear and the coercive effect thereof in accordance with the demands of those engaged in it.

Both the board and the courts, if they are to continue to function as instrumentalities of effective law enforcement, must have power to deal effectively with concerted action in the nature of a blitzkrieg such as the one in question. The conduct dealt with was no mere isolated instance of animal exuberance or enthusiasm. The evidence will not permit of any such appraisal of the conduct. Both the Circuit Court and the Supreme Court of the State so held (see pp. 41, 42, 136, 137, this brief).

1. The order is more narrowly drawn and adjusted to the factual situation dealt with than was the order in the Meadowmoor case. It does not prohibit advertising the facts of a labor dispute by any means whatsoever or at any place whatsoever except by use of picketing at or near the hotels.

Throughout the brief the petitioners endeavor to place boycotting upon the same plane as picketing (see petitioners' brief, pp. 25, 26, 32, 41, 52 and 70). It is asserted that the *Thornhill*, *Carlson* and *Swing* cases place the right to boycott upon the same constitutional basis as that of picketing. The argument seems to be grounded upon the proposition that a picket, requesting a person not to patronize a place is boycotting. So far as we know, such a request has not been construed to constitute a boycott or to constitute actionable conduct in the absence of malice. The term "boycott" itself implies the use of intimidating or coercive measures. The term implies measures directed at compelling action by virtue of the means employed,—it implies intimidating or coercive conduct far in excess of the mere submission of an idea or facts to the *public* and

the supporting of such idea and facts by peaceful persuasion to the end that such ideas and facts may win acceptance and recognition in the open market of public opinion.

The authorities are all agreed that the common denominator of any boycott is that of agreement by concert of action to withhold patronage or labor or to refuse to perform services or to purchase a product or products. See *Teller on Labor Disputes and Collective Bargaining*, Volume I, Page 444 et seq., Oakes C. ganized Labor and Industrial Conflicts, Page 603 et seq. The term "boycott" cannot be discussed except in terms of intimidation or coercion whether the boycott be primary or secondary. The agreement by concert which is the common denominator of any boycott is in no sense an exercise of the constitutional right of freedom of speech. It does not advise the *public* with respect to anything. It is a mere coercive means. It is a mere coercive instrumentality.

The AF of L is organized upon a basis of perfecting and mainfaining a boycott. The picket is the instrumentality by which the boycott is perfected and maintained, as one of the cornerstones upon which AF of L unionism is grounded is that of not permitting its members to cross a picket line (see p. 91 of this brief). Locals are affiliated with central bodies for the purpose of obtaining the united concert of action of all AF of L members in whatever trade, craft, industry or profession they may be engaged in support of the demands of a contending union. There is a tacit understanding among all affiliates that they will enforce the rule of not crossing a picket line by fine, suspension, expulsion or other disciplinary measure with respect to members who violate it. That rule means that all AF of L

truck drivers and deliverymen refuse to make any delivery at the picketed place of business; that rule means that firms who have had business relations with a picketed firm for years have their own business relations with that firm disrupted in that their drivers will refuse to make deliveries; that rule means that these firms must suffer such disruptions of their business or have labor difficulties of their own if they insist upon their AF of L drivers violating this fundamental rule of trade unionism.*

That rule means that independent contractors who employ AF of L labor and under contract to perform services will not be able to fulfill their contracts with any place of business where there is a picket, as AF of L members will not be permitted to work at the picketed place of business and will leave the job. (This literally means inability to get anything done in the construction line.) That rule means that AF of L orchestras will not be permitted to play at the picketed place.

Illustration might be piled upon illustration. An innocent picket, ostensibly operating within the area of freedom of speech in front of an employer's place of business and carrying an AF of L banner, is in fact the instrument by which such a boycott is perfected and maintained.

The boycott as practiced by the AF of L is obviously coercive and intimidating with respect to the employer against whom it is directed. It is coercive and intimidating as to employees of that employer if the object sought is that of compelling the employees to join a particular labor

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*It may further be noted that such firms are not permitted to discriminate against union men and union principles. Such firms can no more discriminate with respect to hiring than with respect to firing. Phelps Dodge Corp. v. National L. R. Bd., — U. S. —, 85 L. ed. 753, 61 S. Ct. 845.

union. The employer either has to suffer the injurious consequences of such boycott or violate the neutrality which both the National and State Acts require of him with respect to the free and untrammeled choice of employees in relation to collective bargaining matters. It is coercive and intimidating with respect to all employers of AF of L labor who customarily have business contacts with the picketed place of business. They either suffer disruption of their own business relations with that place of business or place themselves in the position of being accused of being "unfair" to organized labor. Any employer of AF of L labor who insists upon his AF of L employees violating the fundamental principle of trade unionism with respect to "not crossing the picket line" obviously is heading for labor trouble of his own within his organization and labor trouble of his own involves labor trouble with the entire AF of L organization. The boycotting as practiced by the AF of L is intimidating and coercive with respect to membership within the organization. All members of the organization even though their trade, craft, industry or profession is not even remotely affected by a particular controversy are expected to and are required to throw their support behind the objectives of the contending union and are required to refrain from all beneficial business contacts of any kind with the picketed place of business. The AF of L is here contending for the constitutional right to coerce employees to join its organization and for the constitutional right to coerce acceptance of this principle by its coerced members. It is here contending for the constitutional right to build coercion upon coercion,—to build power upon power and all under the 14th amendment to the Constitution as an exercise of freedom of speech.

Boycotting does not encompass that which is entittled to constitutional protection as freedom of speech.. There is not a hint or suggestion in any of the cases cited that an organized boycott is entitled to constitutional protection. Free speech under the constitution cannot be stretched to encompass any such conduct. The power of the legislature to deal with the problem of bigness,—the problem of power in relation to any combination, would be nonexistent if the right to boycott were ever conceived to have its roots in the constitution as an exercise of freedom of speech under the 14th amendment. Petitioners' argument is insidious. They seek by sublety throughout the brief to have this Court announce the doctrine that boycotting has its roots in the constitution as an exercise of freedom of speech.

By grounding their argument as to what constitutes a boycott upon a false premise, petitioners then urge that as they are prohibited from boycotting, the order of the board in effect prevents any appeal to the public by whatever means, etc. (See petitioners' brief, pp. 52, 53, 67 and 68.) The argument impresses us as one *in extremis*. No one has ever heretofore conceived that any fair interpretation of the order prevented the petitioners in any way, shape, or manner fro madvertising truthfully any relevant facts and making any truthful appeal to the public that petitioners wish to make through any channel of communication whatsoever and wheresoever, consistent with the right of free speech, with the one exception,—they may not picket *at* or *near* the hotels.

Petitioners do not believe the argument themselves. Their conduct throughout the entire period of the qualified stay granted by the Circuit Court of Milwaukee County

pending appeal to the Supreme Court belies any faith in the argument thus advanced. No stay of any kind was granted by the Circuit court with respect to the boycotting provision of this order (R. I 55). Throughout the entire period of the qualified stay, automobiles carrying signs on the tops thereof with the inscription, "Plankinton and Kilbourn Hotels do not have a contract with AF of L hotel unions. Please do not patronize." were used by petitioners for the period commencing about May 20, 1940. The automobiles daily and for eighteen hours each day, were driven throughout the city of Milwaukee and through the downtown area bearing such inscriptions. Five automobiles were used for such purpose. The automobiles were driven particularly in the vicinity of boat docks, railroad depots, at boat and train times and parked at said terminals where they would attract the attention of passengers arriving at said docks and depots and were driven through the down town area where large numbers of people would see and read such inscriptions.*

Further, the respondent unions and the responsible officers and agents thereof and the state and central bodies with which they were affiliated and the responsible officers and agents thereof and other unions asked the general public not to patronize the hotels and disseminated by word of mouth and in writing whenever opportunity presented that the Plankinton and Kilbourn Hotels were on the "we do not patronize" or "unfair" list and wrote and contacted by telephone persons and organizations that had contracted with said hotels for the holding of banquets or conventions

*See findings (a) and (b) p. 12. findings of fact and conclusions of law in the contempt proceedings, petitioners' appendix to reply brief in support of petition for writ of certiorari.

and urged said parties and said organizations to hold the banquets or conventions elsewhere. Such conduct was continuous throughout the entire period of the qualified stay.*

It is idle to urge that the order by its very terms (p. 52, petitioners' brief) "prohibits every conceivable type of activity which labor organizations might engage in for legitimate purposes." The order does no such thing. Petitioners have never so interpreted it.

The order of the board in the instant case is much more narrowly drawn and adjusted to the factual situation dealt with,—is much less subject to misinterpretation than was the injunction dealt with in the *Meadowmoor case*. In that case all the members of the petitioning union were prohibited

> "From interfering, hindering or otherwise discouraging or diverting, or attempting to interfere with, hinder, discourage or divert persons desirous of or contemplating purchasing milk and cream or other products aforesaid, including the use of said signs, banners or placards, and walking up and down in front of said stores as aforesaid, and further preventing the deliveries to said stores of other articles which said stores sell through retail; (or) from threatening in any manner to do the foregoing acts; * * *"

The injunction did not stop there. It brought within its sweep (or at least was subject to that interpretation) spoken or written words of any other person

> "who may * * * now * * * or hereafter * * * agree or arrange with them * * *"

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*Finding 15, Page 15, Petitioners' Appendix to Reply Brief in support of Petition for Certiorari.

See dissenting opinion of Justice Black in the *Meadowmoor case*. This court's comment in relation to what appears to be such sweeping language of the injunction was,

> "* * * It distorts the meaning of things to generalize the terms of an injunction derived from and directed towards violent misconduct as though it were an abstractt prohibition of all picketing wholly unrelated to the violence involved. * * * Such an injunction must be read in the context of its circumstances. * * *"

So reading the injunction, it was construed to be confined "to conduct near stores dealing in respondent's milk and it deals with this narrow area precisely because the coercive conduct affected it."

In the instant case there is no need at all for narrowing by construction any terms of the order of the board as sustained and enforced by the State Courts. The order is not susceptible of being construed as embracing any more restriction upon free speech than we have placed upon it as set forth above.

C. In sustaining the order of the board the courts of the State anticipated and anticipated correctly this court's holding in the Meadowmoor case.

Petitioners make the point that the board did not predicate its order upon the violent, intimidating and coercive character of the picketing engaged in and did not predicate its decision upon any finding that it could justifiably be concluded that the momentum of fear generated by past violence would survive (see petitioners' brief, p. 39). Petitioners further assert (p. 24) that the board did not find that the union's engaged in this conduct and further assert that the board could not so find. All that need be said upon the latter point is that the board could not possibly have found that the unions did not engage in such conduct,—could not possibly have found that the unions did not ratify the conduct. Under the facts of the case the board obviously could make no finding other than that the unions and the responsible officers and members thereof were responsible for and did approve and ratify the violent, intimidating and coercive (continuously such) character of the campaign.

The board's findings (findings 19-27; R. I. 257-259) are all directed to the violent method in which the campaign was conducted and the union's obvious connection therewith. It seems a rather far fetched argument to urge that the board did not consider the element of violence, force and intimidation, which characterized the campaign in framing its order. Why the particularity of the board's findings with respect to the official union positions of those engaged in the violent conduct and the fact that the union provided bail, counsel, and paid the fines, if the board gave

no consideration to the violence and the union's connection therewith in the framing of its decree? The board obviously did give consideration to the violent, intimidating and coercive character of the campaign carried on by the unions and framed its decree accordingly. What the board obviously did was to set forth in its findings so much of the violent, intimidating and coercive character of the campaign carried on by petitioners as to make manifest the nature, character and quality of that campaign and the union's perfectly obvious connection therewith. The board then adjusted its order to the facts dealt with.

In any event the question before the Circuit Court as well before the Supreme Court of the state was whether the order of the board, under the facts of the case, did contravene any constitutional right of freedom of speech. Under the Employment Peace Act the board makes its order in the first instance. In an action for enforcement or petition for review of a board order, the courts are given power to confirm, modify or set aside the order of the board and enter an appropriate decree (sec. 111.07 (7), Stats.).* The courts, like the board, by sec. 111.15, are charged with the duty of seeing that the order of the board properly adjusted to the factual situation dealt with in no wise violates the constitutional guarantee of freedom of speech.

The Circuit Court of Milwaukee County had held prior to this Court's decision in the *Thornhill case*, that "advertising the facts of a labor dispute" had its roots in the constitutional guarantee of freedom of speech (R. I

*This section, so far as material, provides:
"Upon such hearing the court may confirm, modify, or set aside the order of the board and enter an appropriate decree."

12-47). That Court in appraising the evidence in this case and in passing upon the question of whether the order of the board was adjusted to the evidence in the case and to the factual situation dealt with by the board, specifically upheld the order of the board upon the basis of the violent, coercive and intimidating conduct of the picketing involved and which characterized the campaign from its inception and from which evidence the Court concluded that the board was justified in finding that the attitude of the pickets was continuously threatening or that threatening conduct would be resorted to, should conditions be favorable to that purpose. (R. I 20-21).

In appraising the evidence the Court said: (R. I 24)

> "A full recital, with accurate references to the record, of almost daily conduct and occurrences extending from November 4th to November 18th, and thereafter to about November 27th, 1939, which must be considered ample to support the Board's conclusions as to a purpose to coerce, intimidate and injure, will be found on pages from 8 to 13 of the brief submitted by counsel for the Plankinton House Company. Repetition thereof at this time will not be necessary. The Captain of Police in charge of the force of men maintained on the ground, who has had much experience in maintaining peace and order, when pressed by counsel for the employees to minimize the acts of violence and disorder, very temperately answered: "I wouldn't say small, that depends on circumstances. It is a hard thing for me to answer that as to the amount —' (He was interrupted by counsel at this point: Rec. 448)."

The Court further said: (R. I 20-21)

> "Each case must turn on its own circumstances. In the cases at bar, the Board was justified in concluding that the violent methods, assaults or disturbances which were pursued or which ensued from the outset and from time to time thereafter were ample to characterize the whole campaign or to warrant a reasonable inference that the attitude of the pickets was continuously threatening, or that threatening conduct would be resorted to should conditions be favorable for the purpose. In this connection, constant presence of officers of the law and the nature of conduct employed were sufficient to warrant the Board's findings and conclusions."

Then again in said opinion (R. I 44) the trial court stated:

> "* * * The record presents ample facts and circumstances to warrant the Board's further conclusion that the acts so found characterized the entire campaign from its inception and its order that, for those reasons, it should be terminated."

The same observations apply to the decision of the Supreme Court. That Court in unmistakable language grounded its conclusion that the order did not violate any constitutional right of freedom of speech upon the violent, coercive and intimidating character of the campaign.

Petitioners' argument that the *Meadowmoor case* is not applicable literally goes to the length of urging that such case is not applicable because the State courts did not anticipate the exact language used by this Court in the *Meadowmoor case*. The concept that picketing has its

roots in the constitution under the 14th amendment concededly starts with the *Thornhill case*. See the *Meadowmoor case*. The field is largely uncharted except as this Court has dealt with very narrow issues in subsequent cases. State courts can hardly be expected to anticipate verbatim the language which this court may use in subsequent charting of the field. Both of the State courts in deciding this case clearly did anticipate the rationale of the *Meadowmoor case*.

It was impossible for the Supreme Court of the State to conceive that in the light of the factual situation dealt with by the board any question of freedom of speech could be involved in the order of the board prohibiting picketing *at* or *near* the hotels when engaging in picketing at or near the hotels had resulted in the kind of picketing involved in the instant action,—and all in spite of the policeman's club. The Court could not conceive that the police powers of the State were so circumscribed that the State lacked the power to prohibit that which gave rise to the conduct engaged in or to deal effectively and realistically with the coercive effect of such conduct.

Petitioners concede that the State Supreme Court anticipated this Court's holding in the *Meadowmoor case* when they assert that the State Court in its decision on motion for rehearing, attempted to place its decision upon nonfederal grounds so as to avoid review by this Court. When it is considered that the State Court rendered its decision on motion for rehearing on January 7, 1941, and that the *Meadowmoor* decision was not rendered by this court until January 18, 1941, and that prior to the latter date the State Court had no basis for knowing whether the rationale

of its decision with respect to this order would or would not present a federal question, it seems utterly unfair to the State Court to charge it with attempting to avoid a federal question.

1. The Trial Court's temporary stay order pending appeal to the Supreme Court of the State in no sense determined that it was unnecessary to prohibit picketing as prescribed by the order to eliminate from the case the coercive effect of past conduct or that similar conduct was not likely to be engaged in by petitioners at any propitious opportunity.

On p. 40 of petitioners' brief it is asserted that because the trial Court granted a qualified stay pending appeal to the Supreme Court of the state, that Court must have concluded that it was unnecessary to prohibit picketing as prescribed by the order to eliminate from the case the coercive effect of past conduct and further that said court must have concluded by virtue of granting the stay that similar conduct was not likely to be engaged in by petitioners at any propitious opportunity afforded for engaging in such conduct.

We invite a careful reading of the qualified stay granted by the Trial Court (R I 52-57). It will be noted from the terms of the stay that the petitioners requested a complete stay of all provisions of the order. It will be further noted that the Court refused a stay of any provision of the order including provision (a) relating to picketing but with respect to that provision qualified it by permissive provisions and conditions named in paragraphs (1), (2), (3), (4), (5), (6) and (7) of the stay order (R I 55, 56,

57). The permissive provisions were that the petitioners might, "between the hours of 7 and 8 o'clock A. M., 11:45 A. M. and 1:45 o'clock P. M. and 6 and 7:30 o'clock P. M. on days other than Sunday conduct fair and truthful advertising within the outer or curb side, one-third of the public streets in front of the hotel buildings * * * but not in any adjoining alley or passageways." The advertising was to be conducted by not more than two persons on each side of the hotel, each carrying or displaying a truthful banner or sign and passing and repassing along the full length of the front sidewalk of said hotels (the entire Michigan side of the Plankinton House to be deemed one front or side). The announcements upon the banners were not to be added to by any oral statements or arguments; such advertising was to be conducted without intimidation or coercion or any method involving fraud, misstatement of fact, violence, breach of the peace, or threat thereof and without impeding or interfering with the free use by others of the streets or highways or of the doors, entrances or exits of said hotels and without interfering with the loading or unloading of any baggage, merchandise or articles of any kind at any door, entrance or platform of either of said hotels. The Court carefully avoided any use of the term "picketing" in the stay provisions.

The court reserved jurisdiction to terminate these provisions in the event of any non-compliance. The petitioners were to furnish bond, approved by the court, in the sum of $1,000 for the payment of all damages, as provided in sec. 274.23, Wis. Stats. The petitioners were further to perfect their appeal and prosecute the same with all reasonable speed. Note the trial court's reference to sec. 274.23, Wisconsin Statutes.

At the time this stay was granted it was pretty generally conceded and the bar of the State was decidedly of the impression that when application for stay was made pending appeal, a stay had to be granted as a matter of right, provided the appellants gave bond pursuant to the provisions of the statute. The prior decisions were of such tenor. *State ex rel Boysa v. Fritz*, (1927) 192 Wis. 358, 212 N. W. 655 and *Halsey Stewart and Co. v. Public Service Comm.* (1933) 210 Wis. 184, 248 N. W. 458. There was a serious question whether the Court had any right to qualify the stay in any manner.

The fact that the trial court qualified the stay indicates that the trial court felt that there was an exigency to be met and that no stay should be granted save only such stay as appeared to be compulsory under the appeal stay provisions of the statute. The trial court made every effort to eliminate, so far as there appeared to be power to do so, future occurrences of conduct similar to that theretofore engaged in and endeavored to counteract, insofar as there appeared to be power to do so, the coercive effect of such past conduct. The Trial Court's interpretation of prior decisions as to the right of an appellant to a stay pending appeal upon the furnishing of bond prescribed by the Court was further fortified by the decision of the Supreme Court in *State ex rel. Dep't. of Agriculture v. Marriott*, 235 Wis. 468, 293 N. W. 154 (June, 1940,—decided approximately a month after this stay was granted).

The legal proposition that the trial courts of the State of Wisconsin do have power to exercise discretion with respect to granting of stays pending appeal with respect to the prohibitory as distinct from the mandatory provi-

sions of a judgment was finally decided by the Supreme Court in *Carpenter Baking Co. v. Bakery S. D. Local*, 237 Wis. 24, 296 N. W. 118 (Feb. 5, 1941). The qualified stay granted by the Circuit Court in the instant case was cited by the Supreme Court in the *Carpenter Baking case, supra*, as a model stay pending appeal.

Under the circumstances if any significance can be attached to the Trial Court's granting a qualified stay pending appeal, the significance must be the exact opposite of that for which petitioners contend.

2. Both the Trial Court and the Supreme Court grounded the validity of the order in question upon the violent, intimidating and coercive conduct which characterized the campaign as continuously threatening and coercive far more than did the Supreme Court of Illinois in the Meadowmoor case.

The full extent to which the Trial Court and the Supreme Court of the State anticipated this Court's holding in the *Meadowmoor case* in sustaining the order of the board has heretofore been analyzed. The Supreme Court of the State of Illinois in that case commented only very incidentally in its decision with respect to the justification of the absolute ban to counteract the effect of past violence as follows:

> "* * * picketing by the carrying of a banner with the words 'unfair' etc. printed thereon in connection with or following a series of assaults or destruction of property, could not help but have the effect of intimidating the persons in front of whose premises such picketing occurred and causing them to believe

that non-compliance would possibly be followed by acts of an unlawful character."

The Master, to whom the case had been referred, in the light of his findings of violence, had recommended an injunction such as that finally approved by the Supreme Court of the State. The Trial Court refused approval and limited the injunction to restraint of violent conduct. The Supreme Court reversed and decreed an injunction as recommended by the Master. There are but two short paragraphs in the entire opinion of the Supreme Court of Illinois which sought to justify the injunction approved upon the basis of preventing the coercive effect of past violence. The balance of the decision is directed to a discussion of what is legal and what is not legal conduct in labor disputes under the laws of the State of Illinois. The Supreme Court of the State of Illinois in a subsequent decision specifically stated that it did not ground its decision in the *Meadowmoor case* upon the violence engaged in and that "the issue of violence was not the turning point of the decision." *Ellingson v. Local Drivers Union of Chicago*, 2 Labor Cases, 567, 568, 377 Ill. 76 (1941).

D. Even if the case at bar is not ruled by the Meadowmoor case, the order of the board nevertheless is not violative of petitioners' right to freedom of speech under the 14th amendment as the picketing engaged in was for the purpose of compelling the company to commit an unfair labor practice by entering into an all-union agreement with petitioners contrary to the provisions of sec. 111.06 (1) (c) and (e), Stats.—the picketing was for an unlawful object.

The petitioners were bound by the arbitration award. The contract expressly so provided. That award provided that a closed shop was to be effective only upon the condition that the employees of the company, by a secret ballot conducted under the supervision of the Wisconsin Employment Relations Board, voted in favor of a closed shop by a 75 per cent majority. That provision conformed to the provisions of sec. 111.06 (1) (c) and (e) of the Act. The strike severed contractual relations. This point is res judicata. See footnote, p. 14. See also this brief, p. 90. The strike from its inception was therefore for the purpose of compelling the company to do that which it could not do under the law,—for the purpose of compelling the company to violate the law.

Further, as a result of the strike, the company employees formed an independent union known as the independent organization of Plankinton House Company employees. This union gained recognition as the collective bargaining agent of all employees of the company and was so certified by the board. That certification and the representation proceedings were confirmed and approved by the Circuit Court in its decision in May, 1940 (R I 47). That matter is likewise res judicata. Since the court's con-

firmance and approval of the board's certification of the independent union, the concert of action of the petitioners has been directed at compelling the company to meet another unlawful demand of the petitioners, namely, that of recognizing the petitioners as the exclusive representatives of its employees for collective bargaining purposes when the company is prohibited by law from recognizing any union except the union certified by the board as the exclusive representatives of employees for purposes of collctive bargaining. There can be no legal justification for picketing directed to such objects. (See pp. 12-65 of this brief.)

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CONCLUSION

What petitioners seek to establish in this case is a principle of a constitutional right of combinations (beyond the power of legislative control or regulation) to inflict intentional harm upon any and all who disagree with them and under any and all circumstances by use of all intimidating, coercive or destructive forces (means) which they can command short of actual physical violence or threats thereof (throughout their brief petitioners seek to place boycotting upon the same plane as picketing) if speech is an implementing or an enmeshed medium by which an unlawful object is sought to be reached or by which the unlawful means are made effective.

The foregoing is not an over statement of petitioners' argument. It is not an over statement of what is sought to be established in this case. The concept is so vicious and far reaching in consequence that the Supreme Court of Wisconsin, indeed traditionally liberal as asserted by peti-

tioners in their brief on motion for rehearing in that court, could not accept it. The great concept of freedom of speech under the constituiton cannot be stretched to a point where it destroys all other freedoms. It cannot be stretched to a point where combinations, whether they be combinations of capital or labor, are placed beyond the power of the legislature to cope with their exercise of power. The constitution of the United States lodged power to cope with such exercise of power in the legislatures of the several states. Freedom of speech may not be stretched to a point where such legislative power is in effect non-existent.

For the reasons herein stated the decision of the Wisconsin Supreme Court affirming the decision of the Circuit Court should be affirmed.

Respectfully submitted,

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM — 1941.

No. 124

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL No. 122; PHIL L. VALLEY, JOHN ALEXANDER and JACK HEISDORF, each individually, as business agent, organizer and vice-president, respectively, for and as representatives of all the members of Hotel & Restaurant Employees' International Alliance, Local No. 122;

INTERNATIONAL LAUNDRY WORKERS, LOCAL No. 174;

BARTENDERS INTERNATIONAL LEAGUE OF AMERICA, LOCAL No. 64, sometimes known as International Bartenders & Beverage Dispensers, Local No. 64;

INTERNATIONAL UNION OPERATING ENGINEERS, LOCAL No. 311;

MILWAUKEE BUILDING TRADES COUNCIL;

All affiliated with the American Federation of Labor,

Petitioners and Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD; HENRY C. FULDNER, individually and as Chairman of, L. E. GOODING, individually and as a member of, R. FLOYD GREEN, individually and as a member of the Wisconsin Employment Relations Board;

PLANKINTON HOUSE COMPANY, a corporation,

Respondents and Appellees.

BRIEF OF PLANKINTON HOUSE COMPANY, Respondent.

WALTER H. BENDER,
Of Counsel.

HERMAN M. KNOELLER
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Plankinton House Company,
Respondent.

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM — 1941.

No. 124.

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL No. 122, et al.,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, PLANKINTON HOUSE COMPANY, et al.,

Respondents.

BRIEF OF PLANKINTON HOUSE COMPANY, Respondent.

NATURE OF ACTION

This proceeding comes before the Court upon a Writ of Certiorari granted to review an original decision of the Wisconsin Supreme Court (*236 Wis. 329, 294 N. W. 632*) rendered November 8, 1940, and confirmed on January 7, 1941, when a motion for rehearing was denied. The State Supreme Court affirmed the judgment of the Circuit Court of Milwaukee County, Wisconsin, which sustained, and enforced an order made by the Wisconsin Employment Relations Board on February 15, 1940. Pro-

ceedings before the Board were instituted by filing of the complaint of Plankinton House Company charging the Petitioners with violence, mass picketing and other unfair labor practices under the Wisconsin Employment Peace Act (Chapter 111, Wis. Stats. 1939). A full and complete hearing was had before said Board, which filed its Findings of Fact and Conclusions of Law determining that the Petitioners were guilty of violence and other unfair labor practices and issued its order directing, inter alia, that the Petitioners immediately cease and desist from:

(a) Engaging in, promoting or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;

(b) Attempting to hinder or prevent by threats, intimidation, force, or coercion of any kind, the pursuit of lawful work by employees of the Plankinton House Company;

(c) Boycotting in any way the Plankinton House Company.

STATEMENT OF JURISDICTIONAL GROUNDS

Petitioners claim that the case involves a justiciable controversy under Sec. 237 (b) of the Act of Congress dated February 13, 1935 (28 U. S. C. A. 344 (b)). The position of the respondent, Plankinton House Company on the question of jurisdiction is fully set forth in the "Statement on Jurisdiction" appearing in its brief in opposition to the petition for the Writ of Certiorari.

The only additional observation it makes is that the very two federal questions now sought to be interposed by the Petitioners as the basis for this Court's jurisdiction (p. 4 Petitioners' Brief) namely, (a) "Whether a requirement that the majority of employees in a bargaining

unit must authorize a strike before peaceful picketing and boycotting pursuant thereto can be permitted" and (b) "Whether the order and the enforcing judgment prohibiting picketing and boycotting" violated the Fourteenth Amendment, were held not to exist factually in the case at bar and were expressly excluded from the opinion of the Wisconsin Supreme Court which stated (S. R. 70-71)[1]:

> "Under the statute and the order of the board as interpreted and construed by the explicit language of the opinion, freedom of speech and the right peacefully to picket is in no way interfered with. The appellants could not be ordered to cease and desist from something they were not engaged in.
>
> "We did not attempt because it was not involved in this case to distinguish between what a majority group may do in carrying on a strike from what the minority group may do. We pointed out that the statute nowhere prohibited employees from withdrawing from their employment either singly or in groups and certainly it in no way interferes with the right of free speech. (Par. (e)) as construed does not prohibit, as described in the Thornhill case, peaceful picketing."

ISSUES INVOLVED

1. Does *Sec. 111.06 (2) (e) Wis. Stats.* as construed by the Wisconsin Supreme Court evidence a careful balancing of public and private interests by the State Legislature and is it narrowly drawn and specifically aimed at serious encroachments upon those interests so as to be a valid exercise of the State's police powers reserved in the Tenth Amendment, or, does such statute, so construed, regulate unreasonably the effective exercise of the constitutional

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[1] "S. R." refers to the Supplemental Record or Vol. II of the Transcript of the Record printed by the Clerk of this court, whereas "R." refers to the Record used in the Wisconsin Supreme Court and contained in Vol. I of the Transcript of Record herein.

rights of free speech and equal protection of the law guaranteed by the Fourteenth Amendment?

2. Do the order of the Wisconsin Employment Relations Board and the judgment of the State courts sustaining and enforcing such order result in an unconstitutional application of the above statute to the facts in the case at bar?

CORRECTED STATEMENT OF FACTS[1]

The Court's attention is called to these salient matters of record not appearing in the Petitioners' brief:

(1) The Labor Contract (Exh. 1, R. 83) which the Petitioners had with the Plankinton House Company prior to the calling of the strike on November 2, 1939, was admitted by the Unions to be the finest hotel labor contract existing in the United States — the wages paid were as high as, if not higher than, those paid in any other city of the country (R. 225-226). It was the boasted work of art of the Unions' attorneys (R. 173, Exh. 19, pp. 12-13).

(2) The peaceful negotiations between the parties to settle their differences were abruptly terminated by the Unions' attorneys demanding arbitration and threatening to send through the mails to prospective hotel guests a letter denouncing the Plankinton House Company for assuming an anti-labor attitude, urging the cancellation of hotel reservations by guests and foretelling that there

[1] The true Record of Facts, showing numerous acts of violence and continuing manifestations of force, fear and unfair advertising on the part of the petitioning unions, their officers and members, is set forth on pp. 6 to 26, inclusive, of the writer's Brief on behalf of the Plankinton House Company in Opposition to the Petition for Writ of Certiorari and is not repeated here but is incorporated by way of reference for the sake of brevity.

would be union picketing at a strikebound hotel resulting in crippled and curtailed services (Exh. 7, R. 83-84).

(3) The Labor Contract (Exh. 1, R. 83) between the parties provided in Par. 4 of Article I thereof:

> "If the parties cannot reach an agreement through negotiation on or before thirty days after the termination of the preceding contract year, the differences shall be submitted to arbitration in the manner and form hereinafter set forth."

and Article III of said Labor Contract providing for arbitration stated:

> "The arbitration award shall be final and binding upon both parties. There shall be no strike or lockout during the life of this contract, provided, however, in the event both parties elect to continue the contract but negotiate changes, if there is no agreement resulting from such negotiation within thirty days after the termination of the preceding contract year and the same is then submitted to arbitration and either party is dissatisfied with the result of the arbitration, then the right to strike or lockout shall be had by the respective parties. * * *"

(4) The arbitration award (Exhibit 9, R. 84) was rendered on October 31, 1939, and granted all the demands of the Unions except that *if the Union desired an all-union contract*, a three-fourths vote of the employees in each proper collective bargaining unit should first be obtained by secret ballot in a referendum conducted by the Wisconsin Employment Relations Board as required by Sec. 111.06 (c) of the Wisconsin Employment Peace Act.

(5) On November 1, 1939, the employer gave written notice of his acceptance of this arbitration award (Exhibit 10, R. 84, 256) and the Unions' attorneys acknowl-

edged receipt thereof on November 2, 1939 (Exhibit 11, R. 84).

(6) On the very same day (November 2, 1939) at about 4:00 p. m. the Unions' Business Agent, Phil L. Valley, called a general strike at the Plankinton House Company, ordered all employees in every department of the hotels (Plankinton House Hotel and the Kilbourn Hotel) to cease work and threw a picket line of 75 to 80 men about all the entrances of the hotels (Board's Finding No. 14, R. 84, 85, 256). At the time the strike was called the hotels were filled to capacity with school teachers who were in Milwaukee for the State Teachers Convention (R. 153-158).

(7) Prior to calling of the strike the Unions did not vote by secret ballot to call such strike as required by Sec. 111 (2) (e) Wis. Stats. and this fact was expressly so stipulated (R. 82).

(8) The Board found that all contractual relationships existing between the parties were terminated by the Unions on November 2, 1939, by the refusal of the Unions to accept the award of arbitration and the act of calling a strike (Board's Conclusions of Law No. 1 and No. 2, R. 259, 260);

(9) Out of 188 employees, 148 had returned to work on December 1, 1939, at the time of the hearing before the Board so that the hotels continued to operate but it was necessary for the City of Milwaukee to post six policemen about the hotels throughout the time of the strike and for twenty-four hours each day for the purpose of maintaining order — at times additional police officers were necessary to permit deliveries to and from the hotels, and protect persons and property (R. 158, 197, 257, S. R. 32).

(10) The true record of physical violence, mass picketing, secondary boycott and other unfair labor practices generating fear and intimidation is set forth in the brief of the Plankinton House Company in opposition to the Petition for Writ of Certiorari and, for the sake of brevity, is incorporated herein by reference; the aforesaid coercive activities of the Unions, their officers and members were not "fugitive encounters" or "occasional excesses" in moments of "animal exuberance" as alleged (pp. 6, 43-50 of Petitioners' Brief), but were studied and concerted manifestations of force, fear, and other unfair labor practices, committed by high ranking officers of the Union, picket captains and supervisors of the picket line, not once, but several times, in respect to which the Unions provided bail, legal counsel and even paid the criminal fines upon conviction (R. 257-258).

ARGUMENT

Summary of Argument

I. *Sec. 111.06 (2) (c) Wis. Stats.* as construed by the Wisconsin Supreme Court evidences a careful balancing of public and private interests by the State Legislature and is narrowly drawn and specifically aimed at serious encroachments upon those interests so as to be a valid exercise of the State's police powers reserved in the Tenth Amendment.

A. The private right to picket, boycott and engage in overt concomitants of a strike is not absolute.

B. The State's power over manifestations of force and coercion in labor matters is well established.

C. Analysis of the Wisconsin Employment Peace Act shows it is a reasonable regulation of the State's police powers.

D. Equal protection of the law is not denied by the Majority-Minority classification of *Sec. 111.06 (2) (e) Wis. Stats.* for it is an accepted reasonable form of legislative classification in labor matters.

E. The qualified right of free speech is neither involved nor invaded.

II. The order of the Board and the enforcing judgment of the State Court constitutionally apply the Wisconsin Employment Peace Act to the proven facts in the case.

A. The record shows violent means were adopted for unlawful purposes and continued fear and intimidation exist.

B. The record shows the Unions authorized, participated in and ratified the acts of violence and other unfair labor practices.

C. The order of the Board enforced by the judgment of the State Court is not too broad and comprehensive.

I.

Sec. 111.06 (2) (e) Wis. Stats. As Construed by the Wisconsin Supreme Court Evidences a Careful Balancing of Public and Private Interests by the State Legislature and Is Narrowly Drawn and Specifically Aimed at Serious Encroachments Upon Those Interests So as to Be a Valid Exercise of the State's Police Powers Reserved in the Tenth Amendment.

A. The Private Right to Picket, Boycott and Engage in Overt Concomitants of a Strike.

The first jural postulate in the science of jurisprudence is that in a civilized society men must be able to assume that others will commit no intentional aggressions upon them and the corollary thereto is that one who intentionally does anything which on its face is injurious to another must repair the resulting damage unless he can (1) justify his act under some social or public interest, or (2) assert a privilege because of a countervailing individual interest of his own which there is a social or a public interest in securing (*Roscoe Pound, Outlines of Jurisprudence,* pp. 107, 117, 118). This principle has been incorporated in the *Restatement of the Law on Torts* (Vol. 4, pp. 94, 95, 141) wherein it is stated:

> "Concerted action by workers to enforce the requests of workers necessarily involves pressure on the employer which may cause him financial loss or at least interfere with his freedom to operate his business as he likes, and such concerted action necessarily involves the infliction of intentional harm. This was regarded as subjecting the workers to liability unless their conduct was justified; this theory has prevailed. The development of the law in succeeding years has related to the issue of justification."

The law is further splendidly summarized by the American Law Institute in Volume 4 of *Restatement of the Law on Torts* where it is stated (Sec. 775, 794, 796):

> "Workers are privileged intentionally to cause harm to another by concerted action if the object and the means of their concerted action are proper; they are subject to liability to the other for harm so caused if either the object or the means of their concerted action is improper.
>
> * * *

"An act by an employer which would be a crime or a violation of a legislative enactment or contrary to defined public policy is not a proper object of concerted action against him by workers.

* * *

"When workers engage in concerted action against an employer for more than one object and one or more of the objects are improper, their action is not for a proper object so long as they insist on the improper objects."

The great liberal, Justice Brandeis, stated in *Dorchy v. State of Kansas* (1926), 272 U. S. 306, 47 Sup. Ct. 86, 71 L. Ed. 248, that neither the common law nor the Fourteenth Amendment to the United States Constitution confirms the absolute right to strike. Previously this same jurist in a famous dissenting opinion in the case of *Truax, et al., v. Corrigan* (1921), 257 U. S. 312, 42 Sup. Ct. 124, 66 L. Ed. 254, thoroughly reviewed the history of labor combinations, picketing and boycotting and reached the following conclusions:

1. That the relation of employer and employee affords a constitutional basis for legislation applicable only to persons standing in that relation.

2. That *in the absence of state legislation,* the Courts, by the exercise of a quasi legislative function, determine the public policy as to the instruments that may be lawfully used by the contestants in labor disputes *without involving a breach of the peace or injury to tangible property.* (Italics ours.)

3. That by no great majority the judicial opinion in America declared illegal the boycott as commonly practiced.

4. That by no great majority the prevailing judicial opinion inclined towards the legality of peaceful picketing.

Under the drive of the dilemma that picketing is either pure, undiluted economic coercion or an exercise of the constitutional right of free speech, new channels of thought cut themselves into the labor law and literature of the country. The modern starting point of the legal status of picketing with its alleged "vague contours" is the case of *Thornhill v. Alabama* (1940), 310 U. S. 88, wherein this Court made these pertinent observations (pp. 101, 102):

> 1. "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."
>
> 2. "The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."

In *Carlson v. California*, 310 U. S. 106 at 113, this Court stated:

> "For the reason set forth in our opinion in *Thornhill v. Alabama*, supra, publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within the liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a State."

In *Milk Wagon Drivers Union of Chicago, Local 753, et al., v. Meadowmoor Dairies, Inc.* (1941), 312 U. S. 287 at 293, it was said:

> "Peaceful picketing is the workingman's means of communication. It must never be forgotten, however, that the Bill of Rights was the child of the Enlight-

> enment. Back of the guarantee of free speech lies faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind. It was in order to avert explosions due to restrictions upon rational modes of communication that the guarantee of free speech was given a generous scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution."

Lastly, in *American Federation of Labor v. Swing*, 312 U. S. 321 at 326, this Court held that:

> "The right of free communication cannot, therefore, be mutilated by denying it to workers in a dispute with an employer, even though they are not in his employ."

By virtue of the aforesaid recent decisions of this Court, it cannot be denied that peaceful picketing, especially the publicity aspects thereof, have a constitutional basis under the Right of Free Speech and the Right of Free Press, which Rights are, as hereinafter shown, not absolute but qualified and subject to reasonable regulation by the State's police powers.

B. The State's Power Over Manifestations of Force and Coercion in Labor Matters.

That the State of Wisconsin has the right to control all manifestations of force, fraud and fear whether practiced by physical means or otherwise, within its boundaries and to regulate the use of the coercive weapons of industrial strife — the lockout, the strike, picketing, boycotting and other overt concomitants of a strike — by powerful combinations of either capital or labor, acting in concert, is now firmly established by decisions of the highest state and federal courts.

Thus, in the exercise of this police power Wisconsin has declared it criminal to concert together for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession by any means whatsoever (*Sec. 343.681 Wis. Stats.*) or by threats, intimidation, force or coercion of any kind to hinder any other person from engaging in any lawful work (*Sec. 343.683 Wis. Stats.*). These statutes have been held to be constitutional and to apply particularly to malicious mischief of combinations subject to legislative repression as pointed out by this Honorable Court speaking through Mr. Justice Holmes in *Aikens v. Wisconsin*, 195 U. S. 194.

In addition to the aforesaid criminal enactments, Wisconsin has provided a Labor Code which declares what constitutes lawful conduct in civil matters relating to labor disputes (*Sec. 103.53 Wis. Stats.*). The Code permits peaceful picketing but specifically conditions this conduct upon the absence of intimidation, coercion, fraud, violence, breach of the peace or threat thereof and expressly states that nothing therein shall be construed to legalize a secondary boycott. This Wisconsin Labor Code was held to be constitutional and a valid exercise of the State's police powers in *Senn v. Tile Layers Protective Union*, 301 U. S. 468, where peaceful picketing in Wisconsin was fully defined by Mr. Justice Brandeis, who concluded (p. 481):

> "The laws of Wisconsin as declared by its highest court, permit Unions to endeavor to induce an employer when unionizing his shop to refrain from working in his business with his own hands. * * * Whether it was wise for the State to permit the Unions to do so is a question of public policy — not our concern. The Fourteenth Amendment does not prohibit it."

Again, in the case of *Lauf, et al., v. Shinner & Co., Inc.*, 303 U. S. 323, the aforesaid Wisconsin Labor Code, espe-

cially Sec. 103.53 thereof, was carefully examined and found binding upon the federal courts — particularly the construction and application thereof by the Wisconsin Supreme Court.

The more recent pronouncements of this Honorable Court summarize and crystallize the power of the State in matters of labor relations. Thus, it is stated in *Thornhill v. Alabama,* 310 U. S. 88, at 103, 104, 105:

> "The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private ncern."
>
> "It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants. * * *
>
> "The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives and the property of its residents cannot be doubted."

In *Carlson v. California,* the identical language used in the last quotations from the *Thornhill case,* supra, was repeated.

In *A. F. of L. v. Swing,* 312 U. S. 321 at 325, we find this significant passage:

> "That a State has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic."

After admonishing judges not to be so innocent of the actualities of industrial conflict and recognizing that the judiciary has no power to formulate state policy or pass

upon the wisdom of a State Labor Code, this court observed in the recent *Meadowmoor Dairies case*, 312 U. S. 287 at 295:

> "The Fourteenth Amendment still leaves the state ample discretion in dealing with manifestations of force in the settlement of industrial conflicts. And in exercising its power a state is not to be treated as though the technicalities of the laws of agency were written into the Constitution. * * *
>
> "It is therefore relevant to remind that the power to deny what otherwise would be lawful picketing derives from the *power of the states to prevent future coercion. * * * We are here concerned with power and not with the wisdom of its exercise.*" (Italics ours)

If the State of Wisconsin has the power to enact valid criminal and civil laws relating to labor relations as shown above, then it must also have the power to enact the Wisconsin Employment Peace Act to provide against unfair labor practices of employers, employees or strangers, thereby preserving for all employees — whether affiliated with organized labor or not — the right of self-organization and collective bargaining through representatives of their own choosing free from coercion from any source — including powerful trade unions. If the State of Wisconsin had the power to enact the 1935 Labor Code which was held constitutional by this Court in *Senn v. Tile Layers Protective Union*, 301 U. S. 468, and *Lauf, et al., v. Shinner & Co., Inc.*, 303 U. S. 323, then it also had the power to repeal its Labor Code and change its public policy in respect to labor relations by enacting the Wisconsin Employment Peace Act. Furthermore, the State of Wisconsin must also have the power to prevent the defeat of its new labor policy seeking *unity, security and prosperity* in the State through industrial peace, regular and adequate income for employees and uninter-

rupted production of goods and services. To deny the State appropriate means to attain the objects of its power is in effect to deny the existence of its power. Thus, in *Cantwell, et al., v. Connecticut,* 310 U. S. 296, 307, 308, this Court stated that the declaration of a state's policy as distinguished from a mere Common Law concept would "weigh heavily in any challenge of the law as infringing constitutional limitations," and that:

> "No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, *or other immediate threat to public safety, peace, or order appears, the power of the state to prevent or punish is obvious.*" (Italics ours.)

When the question of national unity and security was at stake and conflicted with an individual's constitutional right of religious freedom, this Court did not hesitate to vindicate the paramount right of the nation to insure unity and security through internal peace and cohesion. It should not hesitate now to declare the similar paramount right of the State of Wisconsin to insure unity and security through industrial peace.

In the case of *Minersville School District, et al., v. Gobitis,* 310 U. S. 586, it was held that the local Board of Education in Pennsylvania and the Legislature of that state could constitutionally require children to take the oath of allegiance to the flag and give the salute without infringing upon the due process of law or invading the right of religious freedom and liberty guaranteed by the Fourteenth Amendment for, it was stated (pp. 595 and 600):

> "*National unity is the basis of national security.* To deny the legislature the right to select appropriate means for its attainment presents a totally different order of problem from that of the propriety of subordinating the possible ugliness of littered streets to the free expression of opinion through distribution of handbills. * * * Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. *But to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties.*" (Italics ours.)

The very last words written in the opinion of the Court in the *Meadowmoor Dairies, Inc., case,* 312 U. S. 287 at 299, were:

> "Just because these industrial conflicts raise anxious difficulties, it is most important for us not to intrude into the realm of policy-making by reading our own notions into the Constitution."

Only by a strict adherence to this rule of segregation of powers can the independency of the Judiciary itself and the sovereignty of the states be preserved in our democratic form of federal government.

Therefore, it logically follows that the State of Wisconsin, in the exercise of its sovereign police powers, has the undeniable right to control all manifestations of force and coercion whether practiced by physical means *or otherwise* within its borders, regulate the *concerted use of coercive weapons of industrial strife* and for that purpose to enact the Wisconsin Employment Peace Act subject to the express legislative mandate (*Sec. 111.15 Wis. Stats.*) that:

> "Nothing therein shall be construed * * * to invade unlawfully the right to freedom of speech,"

and the judicial mandate of the Wisconsin Supreme Court that in the construction and application of *Sec. 111.06*

(2) (e) Wis. Stats. it must be expressly understood by the enforcing authorities that (S. R. 70, 71):

> "Under the statute and the order of the Board as interpreted and construed by the explicit language of the opinion, freedom of speech and the right peacefully to picket is in no way interfered with * * *. Par. (e), as construed, does not prohibit, as described in the Thornhill case, peaceful picketing."

Whether it was wise for the State of Wisconsin to so restrict the use of coercive instrumentalities of industrial strife by powerful combinations, is a question of public policy. As Mr. Justice Brandeis said, it is "no concern" of the Federal Government, for "the Fourteenth Amendment does not prohibit it," and the judgment of the highest state court as to the construction and application of the State Labor Code is conclusive upon the Federal Judiciary (*Senn. v. Tile Layers Protective Union,* 301 U. S. 468 at 481; *Lauf, et al., v. Shinner & Co., Inc.,* 303 U. S. 323; *Minnesota v. Probate Court,* 309 U. S. 270 at 273).

C. Analysis of the Wisconsin Employment Peace Act.

Aside from the background of coercion created by physical violence and otherwise and the continuity of fear and intimidation generated thereby which were clearly proven by the Record, found by the Board and authenticated by the State Judiciary, it is believed that the Wisconsin Employment Peace Act, especially *Sec. 111.06 (2) (e)* thereof, can be sustained as a valid exercise of the state police powers guaranteed by the Tenth Amendment. This, of course, requires a fair analysis devoid of a fire to pervert as pointed out in the *Meadowmoor Dairies, Inc., case,* 312 U. S. 287 at 298, where this Court said:

> "Nor ought State action be held unconstitutional by interpreting the law of the State as though, to use

a phrase of Mr. Justice Holmes, one were fired with a zeal to pervert."

The same spirit "to save rather than destroy" that pervaded this Court's opinion in sustaining the constitutionality of the National Labor Relations Act, should now prevail in judging the constitutionality of the Wisconsin Employment Peace Act (*National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 at 30).

In testing, therefore, the constitutionality of *Sec. 111.06 (2) (e) of the Wisconsin Act* "on its face" we must consider the entire Act in order to ascertain the true legislative intent. We must, as indicated in the *Thornhill case,* ascertain whether there has been a careful balancing of the above mentioned private and public constitutional rights and interests — whether the statute has been "narrowly drawn to cover the precise situation giving rise to the danger" — whether it has been aimed specifically at serious encroachments (a clear and present danger of substantive evils) to the lives, liberty and property of the people of the State of Wisconsin. To call the Legislature of Wisconsin "reactionary" and the Wisconsin Employment Peace Act passed in 1939 "an employee slavery act" designed to destroy the workers' right to self-organization, collective bargaining and equalization of employer-employee bargaining powers as Petitioners do in their brief (pp. 18-22) merely "begs the question" and proves nothing but their ability at "name-calling."

The history and the philosophy of the Law of Labor Relations in Wisconsin prove conclusively the grave legal and social problems that confronted the Legislature of Wisconsin when it passed the Wisconsin Employment Peace Act of 1939. National and international affairs were in a most chaotic condition. Production of goods and services by employers and regular employment and adequate income

for employees — all making for state unity, security and prosperity — were interrupted and often destroyed entirely by violent and coercive picketing, boycotting and other overt concomitants of a strike conducted by powerful national and international trade unions. Industrial peace was threatened by these combinations of Labor bent upon gaining jurisdictional power, conducting organizational campaigns and even usurping governmental control over the very lives, liberty and property of the workers of the country. The truth of this observation is made clear when we realize that the worker's job in this economic world is almost tantamount to his life.

The early Wisconsin labor laws were inadequate to cope with this "clear and present danger of substantive evil" resulting from the coercive and often violent activities of labor combinations. Thus *Sec. 133.07 Wis. Stats.* passed in 1919 by the Legislature merely gave the working people of the State of Wisconsin the right to organize into trade unions to advance their social and industrial interests without the danger of legal liability for conspiracy by so doing and severely restricted the issuance of injunctions by the state courts in employer-employee controversies. Under this statute workers were protected in their right to self-organization and collective bargaining from coercion practiced by all persons or groups of persons *except their own or other trade unions.*

Thereafter, in 1931, the Wisconsin Legislature enacted a "Labor Code" (*Ch. 376, Laws of 1931*, known as *Sec. 268.19 to 268.29 Wis. Stats.*, 1931 and 1933, and renumbered in 1935 as *Sec. 103.51 to 103.63 Wis. Stats.*) which defined a labor dispute so as to include not only a controversy between an employer and his employees concerning wages, hours and working conditions, but also a controversy concerning the association or representation of em-

ployees in the exercise of their right of self-organization and collective bargaining between the employer and a person or association "regardless of whether or not the disputants stand in the proximate relation of employer and employee." This definition of a labor dispute became the opening wedge for exploitation of Wisconsin workers by large, powerful combinations of labor. Intensive organizational drives and bitter jurisdictional disputes practically destroyed labor relations between the employer and his employees. Representatives of these combinations of organized labor not only demanded but dictated the terms of employment contracts in Wisconsin.

The Courts of Wisconsin, confronted with the legislative mandates contained in the "Labor Code" were powerless to grant any judicial relief. Thus in *Trustees of Wis. State Federation of Labor v. Simplex* (1934), 215 Wis. 623, 256 N. W. 56, a labor union was held to have obtained a substantive right in respect to collective bargaining under the Wisconsin Labor Code and could enforce that right as a party-plaintiff in a suit in equity for an injunction against an employer who allegedly interfered with his workers' rights to self-organization and collective bargaining. In *American Furniture Co. v. I. B. of T. C.* (1936), 222 Wis. 338, 268 N. W. 250, the State Courts held that under the Labor Code the plant of an employer might be subjected to coercive picketing by a labor union although there was perfect harmony and no labor controversy between the employer and his employees who did not belong or desire to belong to any labor union. Under the same Labor Code it was held that a labor union might conduct coercive picketing operations for the purpose of coercing an employer to desist from performing work with his own hands and in his own business even though all his employees were members of the union and he was in-

eligible to become a member thereof (*Senn v. Tile Layers Protective Union* (1936), 222 Wis. 383, 268 N. W. 270, 268 N. W. 875). This last mentioned case was appealed to the United States Supreme Court (*Senn v. Tile Layers Protective Union*, 301 U. S. 468) where the judgment of the Supreme Court of Wisconsin was affirmed in this language, p. 481:

> "The laws of Wisconsin, as declared by its highest court, permit unions to endeavor to induce an employer, when unionizing his shop, to agree to refrain from working in his business with his own hands * * *. Whether it was wise for the state to permit the unions to do so is a question of its public policy — not our concern. The Fourteenth Amendment does not prohibit it."

On April 15, 1937, a little more than a month before the United States Supreme Court rendered its decision in the *Senn case*, supra, the Wisconsin Legislature enacted a law entitled "The Unfair Labor Practice Act" (Ch. 51, Laws of 1937, later known as Ch. 111 Wis. Stats. 1937). This 1937 Unfair Labor Practice Code was very similar to the National Labor Relations Act in that it was directed against the conduct of employers and not employees. Labor unions and employees could indulge in unfair labor practices with legal impunity whereas the employers' conduct was subjected to the utmost scrutiny.

It became apparent to all fair-minded citizens of the State of Wisconsin that the employer, non-union workers and the public were suffering from the unchecked economic power that was lodged in labor unions and their members. The State Legislature had gone too far in attempting to equalize the employer-employee bargaining power. It was necessary that there be a new careful balancing of the rights and the interests involved in every labor controversy. On May 5, 1939, the State of Wisconsin, therefore, enacted

the Employment Peace Act, Ch. 57, Laws of 1939, *Sec. 111.01 - 111.19 Wis. Stats.*, and sought to reasonably regulate concerted activities of combinations in the practice of coercive picketing, boycotting and other overt concomitants of a strike and forbade not only employers but employees and combinations of either from engaging in certain unfair labor practices deemed detrimental to the State's welfare.

The purpose of the Wisconsin Employment Peace Act and the public policy of the State in respect thereto is plainly and unmistakably set forth in *Sec. 111.01 of the Act*. It is therein stated that there are three major interests involved in every strike, namely, the public, the employee and the employer; that industrial peace, regular employment and adequate income for the employee and uninterrupted production of goods and services are promotive of all these interests which are dependent upon peaceful adjustment of whatever controversy may arise; that the primary rights of third parties should not be invaded; that negotiations of terms and conditions of work should result from voluntary agreement between employer and employees; that standards of fair conduct in employment relations should be established.

By *Sec. 111.04* of the Act it is made clear that every employee in the exercise of his right to self-organization and collective bargaining shall have the free and unfettered right to join or not join any labor organization. The very first labor practice condemned by the Act is the coercion or intimidation of a worker in the enjoyment of his legal rights or the intimidation of his family, the picketing of his domicile or injury to the person or property of a worker or his family whether committed by the employer (*Sec. 111.06 (1) (a)*) or by a fellow employee (*Sec. 111.06 (2) (a)*) — either individually or in concert

with others (*Sec. 111.06 (3) Wis. Stats.*). Other provisions of *Sec. 111.06 Wis. Stats.* further protect the non-union worker and the union worker in the exercise of their legal rights by condemning as unfair labor practices specific coercive activities. Thus, for the first time in Wisconsin the workers' right to self-organization and collective bargaining was freed from *all* coercion, force and fraud.

It is adult sophistry or sophomoric immaturity to claim as Petitioners do in their Brief (pp. 29 and 30) that there did not exist such "clear and present danger of substantive evils" in concerted picketing, boycotting and other overt concomitants of a strike conducted by powerful labor combinations as to warrant the State of Wisconsin enacting the Employment Peace Act. To repeat this claim during a period of National Defense Armament and even now when we are in a State of War is indefensible. Now, if ever, the sovereign police power of the State making for stabilization of employment, adequacy of income, uninterrupted production of goods and services and peaceful adjustment of labor controversies is of paramount importance. Now, if ever, we must have unity and security. Strikes like wars are never profitable, but are extremely wasteful — economically, politically and socially. Detruction of workers' jobs by impulsive and short-sighted labor leaders calling strikes contrary to the wishes of the workers themselves is suicidal in this economic world.

If the workers themselves may combine under the state and federal law to organize and select collective bargaining units and exclusive bargaining representatives by a majority vote, then why may they not likewise ascertain the question of fact pertaining to that matter particularly within their personal knowledge, namely, whether the wages, hours, working conditions or any other substantial

item of labor controversy, is such in their particular employment as to warrant the calling of a general strike? Do not the majority labor under the same working conditions as the minority? Do they not share the gains and suffer the losses involved in labor matters, together as a unit? What is there so unreasonable about a regulation that checks the abuse of power in the hands of large labor combinations by requiring them to first let the workers decide by secret ballot among themselves whether their grievances with the employer are so great as to warrant the use of concerted, coercive instrumentalities of industrial strife or whether they should submit their grievances to the Wisconsin Employment Relations Board for arbitration (*Sec. 111.10 Wis. Stats.*), mediation (*Sec. 111.11 Wis. Stats.*) or for an order requiring the offending employer or others to cease and desist from unfair labor practices (*Sec. 111.06 and 111.07 Wis. Stats.*)?

There can be no serious question about the fact that *Sec. 111.06 (2) (e) Wis. Stats.* when considered with other provisions of the Act is narrowly drawn and specifically aimed at a serious encroachment upon public and private interests. It must be admitted that *Sec. 111.06 (2) (e)* specifically refers to concerted or cooperative action of a group for it provides that it shall be an unfair labor practice for an employee (or any group of persons, *Sec. 111.06 (3)*) —

> "to cooperate in engaging or promoting or inducing picketing, boycotting or other overt concomitants of a strike unless a majority of any collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike."

As the State Supreme Court noted in its opinion (S. R. 56):

> "Par. (e) by its terms does not apply to an individual. An individual cannot cooperate with himself. Subsec. (e) does not forbid an employee to quit his employment individually or in concert with others."

The Legislature further provided by *Sec. 111.15 Wis. Stats.* that the Act shall not be construed to impede the right to strike and the right of individuals to work or to invade unlawfully the right of free speech. Even if an employee is found guilty of an unfair labor practice because of failure to comply with *Sec. 111.06 (2) (e)* he loses only the benefits granted employees under the Act but retains all his rights under the Constitution, the statutory law and the common law as provided by *Sec. 111.07 (1) Wis. Stats.*, and as stated by the State Supreme Court (S. R. 58 and 59). In addition, the State Supreme Court stated that it did not deal with anything approaching peaceful picketing in the case at bar, but that the Unions, their officers and employees being guilty of violence were not in a position to raise any question respecting the right peacefully to picket or the right of free speech, and, even if they could, under the statute and the order of the Board as interpreted and construed by the Court, freedom of speech and the right peacefully to picket as described in the *Thornhill case*, was in no way interfered with (S. R. 70-71). This judgment of the Supreme Court of the State of Wisconsin is conclusive as to the construction and the application of the state labor statute under review (*Senn v. Tile Layers Protective Union*, 301 U. S. 468; *Læuf, et al., v. Skinner & Co., Inc.*, 303 U. S. 323).

Other distinguishing features of the Wisconsin Employment Peace Act indicative of the fact that it is narrowly drawn and specifically aimed at serious encroachments upon the personal and the property rights of others by large powerful combinations acting in concert are:

(1) It is neither penal nor criminal in its nature and provides for neither fines nor imprisonment for the commission of the unfair labor practices enumerated therein (*Sec. 111.07 (4) Wis. Stats.*).

(2) It makes no provision by way of reparation or restitution to the employer or employee for the civil wrongs suffered by the commission of unfair labor practices but relegates the parties to their remedies at law and equity to be obtained in separate civil proceedings (*Sec. 111.07 (1) Wis. Stats.*).

(3) It not only recognizes the right of employees to organize (*Sec. 111.04 Wis. Stats.*) but forbids interference therewith (*Sec. 111.06 (1) Wis. Stats.*).

(4) It cautiously provides that nothing therein shall be construed so as to invade unlawfully the right to free speech, or to interfere with or impede or diminish in any way the right to strike or the right of individuals to work (*Sec. 111.15 Wis. Stats.*).

D. Equal Protection of the Law Is Not Denied by the Majority-Minority Classification of Sec. 111.06 (2) (e) Wis. Stats. For It Is an Accepted Reasonable Form of Legislative Classification in Labor Matters.

The Petitioners argue at length in their Brief (pp. 34-38) that the majority-minority classification provided by Sec. 111.06 (2) (e) Wis. Stats. is arbitrary, unreasonable, indefinite and harsh in its operation. Political economy teaches us that the right aim of legislation is the carrying out of the principle of utility, or, in other words, the proper end of every law is the promotion of the greatest happiness for the greatest number. We know from the science of jurisprudence that a right is nothing more than a permission to exercise certain material powers and upon

certain conditions to obtain protection, restitution or compensation by the aid of public force (Cf. *Mr. Justice Holmes, The Common Law,* p. 214; *John Austin, Jurisprudence,* 5th Ed. Lecture 6).

Now the "public force" that is behind the law under question is the force of the mandate of the Legislature of the State of Wisconsin as contained in *Sec. 111.06 (2) (e) Wis. Stats.* The Legislature, not the workers by majority vote, has definitely determined what constitutes unfair labor practices as a matter of law in the State of Wisconsin; the workers are merely required to meet fixed legislative standards for the safety of themselves, the employer and the public generally. National unity and security in the uninterrupted production of goods and services, the stabilization of employment, the adequacy of workers' income and the peaceful adjustment of labor controversies are thereby obtained. The workers ascertain by secret ballot the question of fact, namely, *whether the dispute with the employer is so substantial and meritorious as to warrant a general strike.* They do not determine whether any worker may strike or work. They do not determine whether any worker may peacefully picket or otherwise truthfully publicize the facts of a labor controversy. When such fact of substantiality or lack of substantiality in a labor controversy has been ascertained, fixed legislative standards have been met and the law is self-executing in determining what *concerted and coercive instrumentalities of industrial strife may or may not be used in both an authorized and an unauthorized strike. Sec. 111.06 (2) (e) Wis. Stats.* as construed by the Wisconsin Supreme Court, aided by explicit statutory provisions (*Sec. 111.15 Wis. Stats.*) prohibiting any construction that interferes with the right to strike or the right to free speech, applies only to an unauthorized strike (S. R. 56). The attempted use

of concerted picketing and boycotting in an unauthorized strike is determined to be merely an unfair labor practice — not a crime resulting in the imposition of fines or imprisonment and not even a civil wrong entitled to legal damages by way of reparation. Although one may be found guilty of an unfair labor practice by reason of the provisions of *Sec. 111.06 (2) (e) Wis. Stats.*, he still retains all his rights under the Constitution, the common law and other state statutes, for it is recognized by *Sec. 111.07 (1) Wis. Stats.* that nothing in the Wisconsin Employment Peace Act shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction. This is fully explained in the State Supreme Court's original opinion (S. R. 56-61).

Sec. 111.06 (2) (e) Wis. Stats. is a mere application of the Majority Rule which is fundamental in the attempt of the Legislature and of Congress to regulate labor relations. It is the principle upon which the National Labor Relations Act and the Railway Labor Peace Act and the Wisconsin Employment Peace Act are based. It is the principle whereby the most important affairs of life are determined in the legislative, judicial and executive departments of our democratic form of government. It is the familiar principle upon which the equitable maxim "Equality is Equity" is based. In a labor election held for any purpose the vote of each worker represents an equity. The majority vote represents the majority of the equities. The "group interest" of all the workers is prior and paramount to the "individual interest" of a single worker who by force of his association with his fellow-workers subjects and subordinates his personal selfish interest. If a single worker does not agree with the majority, his right to strike, continue work, peacefully assemble with other members of the minority, protest, reason, speak

freely and publish truthfully the facts of the labor dispute is not even regulated, much less prohibited, by the Wisconsin Employment Peace Act and especially *Sec. 111.06 (2) (c)* thereof. So the Act reads and so the State Supreme Court decided (S. R. 55, 56, 58, 64).

Trade unions themselves govern both their internal affairs with their members and their external relations with the employer and the public by the Majority Rule. Labor's philosophy advocating the all-union or closed shop clearly recognizes and in fact is based on this rule. Was Labor ever heard to demand a unanimous vote of the workers before obtaining a closed shop in any plant? Was Labor ever heard to complain that a majority vote of the workers for a closed shop was insufficient, denied equal protection of the law and resulted in an arbitrary, unreasonable and discriminatory classification of legislative subjects (Petitioners' Brief, p. 34)? Has Labor ever demanded unanimity of vote for the election of union officers? Or, to fine, suspend or expel a recalcitrant member? Or, to call a strike, picket and boycott any particular industry or its non-union employer? Certainly not. The group interest of the majority determining the substantiality and the merit of these questions prevailed against the wishes of any dissenting member or opposing minority. Again we ask, why may not the Legislature adopt similar procedure in the exercise of its police powers relating to labor relations that affect the public interest and the national unity and security so profoundly? Why may not the State Legislature in that field of economic coercion not involving the mere exercise of the right of free speech — termed in the *Thornhill case* the "allowable area of State control" — say that a majority after complying with certain statutory requirements (a majority vote by secret ballot to call a strike) may exercise certain coercive in-

strumentalities of industrial strife — concerted picketing, boycotting, and overt concomitants of a strike — and that the minority not complying with such statutory requirements may not use such coercive instrumentalities upon the majority and thereby interfere with the majority in the enjoyment of their legal rights — especially the right to work, self-organization and finality in respect to their vote in collective bargaining matters? It is clear, as the Milwaukee Circuit Court noted in respect to the Majority-Minority provisions of classification of Sec. 111.06 (2) (e) Wis. Stats. (R 46):

> "These provisions of the Act are reasonable as an effective regulation entirely germane to the scope and aims of the police power of the state to enable groups of workers, many times numerically large, to give free and unhindered expression to their individual convictions and as to whether they consider differences with their employers of sufficient gravity to warrant the cessation of their employment with the attending hardships to themselves and their families during periods which many times become protracted as impressively brought home in the cases at bar."

The difficulties Petitioners conjecture that workers will have under the statute to obtain the necessary majority vote by secret ballot are more imaginary than real. The hypothetical cases they cite in their Brief (pp. 34-38) are doubtful and extreme. These dialectics like generalizations are always odious. For example, what constitutes mass picketing? Why should two or three pickets at a single narrow entrance of a small retail store constitute mass picketing and, therefore, unlawful conduct in one case, and twenty or thirty pickets distributed before several wide entrances of a large manufacturing plant not constitute mass picketing and, therefore, lawful conduct in another case. The answer is that each case must be decided on its own facts and circumstances. Application of the

law to a particular case must be left to the "trier of fact" if there is room for conflicting inferences. With good reason it was said in the case of *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453:

> "Whatever terminology is used, the criterion is necessarily one of degree and must so be defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided for by the great concepts of the Constitution, such as 'interstate commerce,' 'due process,' 'equal protection.' In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion. There is, thus, no point in the instant case in a demand for the drawing of a mathematical line and what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases."

In the Petitioners' Brief (pp. 34, 74-78), the alleged right to use concerted picketing, boycotting and other overt concomitants of an unauthorized strike whenever and wherever Petitioners see fit and however destructive to employers, working employees and the public, is claimed comparable to the right of a citizen in the exercise of free speech to protest the results of a public election. In comparing the right to seek the change of an employee's vote on a labor question with the right of citizens in a public election to change the votes of other citizens on political questions, the Petitioners overlook the undeniable fact that the votes of citizens on political questions may not lawfully be changed by threatening them with the loss of their means of livelihood, their right to self-organization, liberty, property and freedom from force, fear and fraud.

There is a democratic and lawful way of obtaining relief if the Petitioners are justly entitled thereto. Just as they now so vehemently protest against the mandates of the Wisconsin Legislature as construed by the State Supreme Court, so also may they protest to the people of the State of Wisconsin and their legislative representatives against the wisdom or folly of the particular labor statute under attack or any other statute. Certainly, the courtroom is not the arena for debating issues of legislative policy.

The fallacy in Petitioners' argument against the Majority Rule is made more apparent when we carry it through to its logical conclusion. The Petitioners would apply the Majority Rule in creating collective bargaining units and also in electing exclusive bargaining representatives. Here, however, they stop. According to their argument any member of a collective bargaining unit should be allowed, in the exercise of free speech, not only to express freely his own opinion and protest the decision of the majority, but also to reject with or without cause all the labor matters negotiated by the duly elected exclusive bargaining representative and accepted by the majority of his fellow workers. Furthermore, he should be allowed the use of destructive instrumentalities of concerted economic force in conjunction with powerful nation-wide labor combinations *in order to coerce the members of the majority who voted contrary to his wishes to change their vote.* He should be permitted thereby to threaten them with the loss of their jobs by destroying their employer's business. He should be permitted to deprive them of the right of self-organization by denying finality to their vote on all important labor matters. If threats and intimidation fail, usually violence and breaches of the peace ensue, as in the case at bar. All this is done

theoretically in the name of free speech, but practically with an eye to defeat others in the exercise of their rights to self-organization and collective bargaining. Only economic chaos can follow from this philosophy of Discord and Destruction. It cannot be the law in any civilized community which hopes to exist during the present turbulent times as a government of laws rather than a government of men.

The Oregon case of *A. F. of L. v. Bain*, 106 Pac. (2d) 544, cited in Petitioners' Brief (pp. 35, 36) is easily distinguishable for it involved *a penal statute* directed against *individual* action, including the exercise of free speech in *any and every form of peaceful picketing.* (See Wisconsin Supreme Court's analysis of this case in S. R. 56, 57.) The Oregon statute was devoid of any protective provisions as contained in *Sec. 111.15 Wis. Stats.* preventing the unlawful invasion of free speech and in *Sec. 111.07 (1) Wis. Stats.*, preserving for an ex-employee participating in an unauthorized strike his rights under the Constitution, the Statutory Law and the Common Law. Furthermore, the Oregon statute was not narrowly drawn to cover the precise situation giving rise to the danger incidental to the use of certain coercive instrumentalities of an industrial strife conducted by *concerted action of labor combinations.* This is indicated in the split opinion of the Oregon Supreme Court when the majority said:

> "We are far from implying by our decision that proper regulatory measures may not be taken by the state to curb evils arising from activities of labor unions, as of every other group. No right is held absolute — not even the right to speak freely."

In their Brief (pp. 37 and 38) Petitioners question the propriety of applying the Majority Rule to human rights for fear that it might result in the sub-

stitution of principles of arithmetic for principles of morality. The inference that the principle of morality or "natural right" is possessed by the minority alone is illogical and untrue to the facts in the case at bar. Even if the minority were morally right, it would not be controlling upon the court in passing upon the constitutionality of a state statute. The cases holding this principle of law are numerous and collected in *11 American Jurisprudence*, pp. 800 and 801, wherein it is stated:

> "It is now generally recognized that the judiciary cannot annul or pronounce void any act of the legislature on any ground other than that of repugnancy to the Constitution. It was at one time supposed that the courts could resort to the principles of natural justice or common right and pronounce a legislative act void because in conflict with such supposed principles. This view, however, has been finally abandoned. The only test of the validity of an act regularly passed by a state legislature is whether it violates any of the express or implied restrictions of the state or Federal Constitutions, and all acts of the legislature are valid unless they so conflict. Hence, if a given statute is not clearly repugnant to some constitutional guaranty, the courts are without power to interfere, for they do not sit to review or revise legislative action within its constitutional limits. Therefore, the courts have no right to set aside, arrest, or nullify a law passed in relation to a subject within the scope of the legislative authority on the ground that it conflicts with their notions of natural, social, or political rights of the citizen not guaranteed by the Constitution itself."

In short, every citizen is entitled to *equal justice under the law*, not under the various conflicting codes of morality taught throughout the world.

In Petitioners' Brief (p. 60) the constitutional right of free speech is also compared with the right of freedom of religion, both of which are assumed to be absolute

rights. The Petitioners imply in their argument that the State of Wisconsin does not have the sovereign police power to regulate reasonably the concerted exercise of the constitutional right of freedom of religion and, therefore, it may not so regulate the coordinate constitutional right of free speech. The answer to this argument is that the State of Wisconsin has the police power to regulate reasonably both of these constitutional rights. Thus, in the case of *Minersville School District, et al., v. Gobitis*, 310 U. S. 586, it was held by this Court that the local Board of Education in Pennsylvania and the Legislature of that state could constitutionally require children to take the oath of allegiance to the flag and give the salute without infringing upon the due process of law or invading the right of religious freedom and liberty guaranteed by the Fourteenth Amendment. It was stated by the Court (p. 594):

> "The right to freedom of religious belief, however dissident and however obnoxious to the cherished beliefs of others — even of a majority — is itself the denial of an absolute. But to affirm that the freedom to follow conscience has itself no limits in the life of a society would deny that very plurality of principles which, as a matter of history, underlies protection of religious toleration. • • •
>
> "The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects. • • •
>
> "The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities. • • • Nor does the freedom of speech assured by Due Process move in a more absolute circle of immunity than that enjoyed by religious freedom • • • National unity is the basis of national security. To deny the legislature the

right to select appropriate means for its attainment presents a totally different order of problem from that of the propriety of subordinating the possible ugliness of littered streets to the free expression of opinion through distribution of handbills."

Also, in the case of *Cantwell v. Connecticut* (1940), 310 U. S. 296, which involved the constitutionality of a Connecticut statute affecting the right of religious freedom, this Court observed at pp. 306 and 307:

> "Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religion may be at some slight inconvenience in order that the state may protect its citizens from injury. * * *.
>
> "Violation of an Act exhibiting such a legislative judgment and narrowly drawn to prevent the supposed evil, would pose a question differing from that we must here answer. Such a declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations."

It will, therefore, be seen that the right of free speech, press, assemblage and religion are not absolute, but qualified rights and subject to reasonable limitation whenever there is a clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, comfort, peace, order and welfare.

E. The Qualified Right of Free Speech Is Neither Involved Nor Invaded.

Petitioners claim in their Brief (pp. 23-34) that in the exercise of their coercive activities as labor combinations, they may use certain instrumentalities of economic force and industrial strife (concerted picketing, boycotting and

other overt acts concomitant of a general strike) whenever and wherever they see fit and however destructive to the employer, working employees and the general public under the guise of free speech and the State of Wisconsin is powerless to control them. **This is an abuse of the right of free speech. History and Law have always looked upon this right as a Shield against Oppression and not a Sword of Aggression** (Cf. *Lovell v. Griffin*, 303 U. S. 444, 451; *Thornhill v. Alabama*, 310 U. S. 88, 101, 102). Reasonably limited, this freedom is a *"privilege"* in a free government but without such limitation it might become the *"scourge of the republic"* (Justice Joseph Story, *On the Constitution*, Volume 2, Sec. 1580, p. 634).

It is a fundamental principle, long established, that freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right beyond the reasonable control of the State and the Federal Government (*Gitlow v. New York*, 268 U. S. 652). As Mr. Justice Holmes stated in *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. 247 at 249:

> "The most stringent protection of free speech * * * does not even protect a man from an injunction against uttering words that may have all the effect of force."

Under such circumstances speech becomes what has been called "a verbal act" and is as much subject to injunction as the use of any other force whereby property is unlawfully damaged (*Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418). The right of free speech has never been considered to make impossible civil remedies or criminal prosecution for libel, duress or fraud although speech was the agency in each case. The distinction between the exercise by one of his right of freedom of speech and the actual use of the spoken word as an instrumentality to

overpower the will of another is well understood and constitutes the dividing line between what one may do and what one may not do (*Wis. Labor Relations Board v. Fred Rueping Leather Co.*, 228 Wis. 473, 496; 279 N. W. 673). It is a cardinal error to affirm that the right of free speech is so absolute that it may be exercised under any circumstances and without qualifications; like other rights that exist in a civilized society it must always be exercised with reasonable regard for the conflicting rights of others (*Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229). The same is true in regard to the exercise of the constitutional right of religious freedom (*Cantwell v. Connecticut*, 310 U. S. 296; *Minersville School District, et al., v. Gobitis*, 310 U. S. 586) and free press and assemblage (*Schneider v. State*, 308 U. S. 147; *Hague, et al., v. C. I. O.*, 307 U. S. 496).

Petitioners claim in their Brief (pp. 72-74) that the Wisconsin Supreme Court in its opinion improperly used the term "coercion" so as to brand as unlawful certain peaceful activities within the constitutional right of free speech. It is very clear throughout the state court's original opinion that when it used the terms "coercion" and "coerce" it was using them in a generic sense, recognizing the fact that there exists in labor relations permissive coercion in the sense of lawful compulsion or fair persuasion and unpermissive coercion in the sense of unlawful compulsion and unfair persuasion. This is a very common use of the term in labor law literature. Thus, in the *American Furniture Co. case*, 222 Wis. 338, 268 N. W. 250, the state court used the terms "coercion," "coerce," "pressure" and "economic weapon" to express lawful conduct on the part of labor unions and even on the part of an employer in inducing his employees who were unorganized to join a particular labor union. The activi-

ties contained in *Sec. 103.53 Wis. Stats.* are recognized as acts of permissive coercion in labor controversies in the State of Wisconsin. These acts include not only conduct strictly within the exercise of one's constitutional right of free speech but many other activities permitted by the State to disputants in labor controversies. Of course, those activities that are strictly within the exercise of the constitutional right of free speech are not affected by the Wisconsin Employment Peace Act which provides that nothing therein shall be construed to invade unlawfully the right of free speech (*Sec. 111.15 Wis. Stats.*).

When it comes to "unpermissive coercion" affecting an employee's right to self-organization or collective bargaining, the term "coercion" has clear and definite contours. Thus, when this Court had under consideration a provision of the Railway Labor Act to the effect that representatives of employees shall be designated without interference, influence or coercion, it stated in the case of *Texas & New Orleans R. Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 568:

> "The intent of congress is clear with respect to the sort of conduct that is prohibited. *'Interference' with freedom of action and 'coercion' refer to well-understood concepts of the law.* The meaning of the word 'influence' in this clause may be gathered from the context. *Noscitur a sociis. Virginia v. Tennessee*, 148 U. S. 503, 519. The use of the word is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee. 'Influence' in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls 'self-organization.' *The phrase covers the abuse of relation or opportunity so as to corrupt or override the will, and it is no more difficult to appraise conduct of this sort in connection*

with the selection of representatives for the purposes of this act than in relation to well-known applications of the law with respect to fraud, duress and undue influence." (Italics ours.)

In the very recent cases of *Virginia Electric & Power Co. v. National Labor Relations Board*, Oct. 1941 Term Docket No. 25, 26 (still unreported) decided by this Court on December 22, 1941, it was said in respect to the use of free speech as an instrument of coercion by an employer in alleged violation of the rights of his employees under the National Labor Relations Act:

> "Certainly conduct, though evidenced in part by speech, may amount in connection with other circumstances to coercion within the meaning of the Act. If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act.
>
> "In determining whether the company actually interfered with, restrained, and coerced its employees the board has a right to look at what the company has said as well as what it has done.
>
> "Whether there are sufficient findings and evidence of interference, restraint, coercion and domination without reference to the bulletin and the speeches, or whether the whole course of conduct evidenced in part by the utterances was aimed at achieving objectives forbidden by the act are questions for the board to decide upon the evidence."

It is further claimed by Petitioners in their Brief (pp. 68-71) that the State Legislature has no constitutional power to regulate the use of weapons of industrial strife, such as picketing and boycotting, by classifying strikes as authorized and unauthorized strikes. This is merely repeating in other words there can be no permissive and unpermissive coercive concerted activities affecting labor relations and that all "economic pressure," "persuasion," and "coercive conduct" whether committed by individuals

or by groups are beyond the reasonable regulation of the State's police powers.

This, of course, cannot be the law in any civilized community which hopes to exist during the present turbulent times. It certainly is not the law in the United States, and particularly not in the State of Wisconsin. Neither the Common Law nor the Fourteenth Amendment to the United States Constitution confirms the absolute right to strike (*Dorchy v. State of Kansas* (1926), 272 U. S. 306). The right to institute and maintain a boycott cannot be supported under the constitutional guarantee of freedom of speech or assemblage (*Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418; *Robison v. Hotel & Restaurant Employees*, 35 Ida. 418, 207 P. 132, 27 A. L. R. 642; *11 Am. Jur., Sec. 322*, and cases there cited). "The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern" (*Thornhill v. Alabama* (1940), 310 U. S. 88, 103). In dealing with labor relations the State in the exercise of its police power has necessarily a wide field of discretion in order that there may be suitable protection of health and safety and that peace and good order may be promoted through regulations designed to insure peace and stabilization in employment (*Wis. Labor Relations Board v. Rueping Leather Co.*, 228 Wis. 473; 279 N. W. 673; *American Furniture Co. v. I. B. of T. C.*; 222 Wis. 338, 268 N. W. 250; *Senn v. Tile Layers Protective Assoc.*, 222 Wis. 383, 268 N. W. 270, affirmed (1937) 301 U. S. 468).

The Petitioners cite throughout their Brief passages from this Court's decision in the *Thornhill v. Alabama* (310 U. S. 88) and the *Carlson v. California* (310 U. S. 106) cases in support of their alleged legal conduct in

picketing. They ignore the record of violence in the case at bar. They overlook the facts and the nature of the statutory provisions under review in both the *Thornhill* and the *Carlson cases*. Neither the Milwaukee Circuit Court (R. 43-44) nor the Wisconsin Supreme Court (S. R. 55, 56, 70-71) denied the imperative legal effect of these cases, but fully discussed and clearly distinguished them on the basis of the factual situation appearing in the record and the nature of the Wisconsin Employment Peace Act under review. They pointed out that unlike the Wisconsin Statute the enactments in the *Thornhill* and the *Carlson cases* contained criminal terms and penal clauses providing for fines and imprisonment and were so applied by the State Courts as to prohibit *even an individual from peacefully publicizing in any manner whatsoever the true facts of a labor dispute*. They pointed out that the individuals in the above cases were found not guilty of any threats, intimidation, coercion, violence or breach of the peace for, "all words spoken were uttered in a peaceful and orderly manner without putting anyone in fear." They observed that the Statutes that were struck down by this Court as unconstitutional in the above cases were not narrowly drawn to cover a clear and present danger of a substantive evil and did not evidence care in the balancing of public and private interests for as this Court stated (*Thornhill case*, 310 U. S. 88 at 97, 98, 99, 104, 105):

> "A like threat is inherent in a *penal statute, like that in question here*, which does not aim specifically at evils within the allowable area of State control, but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute and exercise of freedom of speech or of the press.
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> * * *
>
> "Sec. 3448 has been applied by the State Courts so as to prohibit *a single individual from walking*

slowly and peacefully back and forth on the public sidewalk in front of the premises of an employer, without speaking to anyone, carrying a sign or placard on a staff above his head stating only the fact that the employer did not employ union men affiliated with the American Federation of Labor.

* * *

"The statute as thus *authoritatively construed* and applied leaves room for no exceptions based upon either the *number of persons* engaged in the proscribed activity, the *peaceful character of their demeanor*, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute.

* * *

"The range of activities proscribed by Section 3448 whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested — including the employees directly affected — may enlighten the public on the nature and causes of a labor dispute.

* * *

"We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify *a statute narrowly drawn to cover the precise situation giving rise to the danger.* * * * *Section 3448* in question here *does not aim specifically at serious encroachments* on these interests and *does not evidence any such care in balancing these interests* against the *interest of the community and that of the individual in freedom of discussion* on matters of public concern." (Italics ours.)

The Wisconsin Supreme Court observed implicity the rule of this Honorable Court stated in both the *Thornhill* and the *Carlson cases*, to-wit:

"The power and duty of the State to take adequate steps to preserve the peace and to protect the pri-

> vacy, the lives and the property of its residents cannot be doubted."

Lastly, in full recognition of this Court's decision in the above cases, the State Supreme Court stated explicitly in its original opinion (S. R. 56) and again in its final opinion (S. R. 71) that *Sec. 111.06 (2) (c)* of the Wisconsin Act does not prohibit peaceful picketing as described in the *Thornhill case*. Where, therefore, is the basis for the Petitioners' claim that all picketing including the free communication of facts in a labor dispute by any means whatsoever, was prohibited by the Wisconsin Employment Peace Act as construed by the State Supreme Court?

It is a strain upon our credulity to hear Petitioners and their attorneys, who have engaged in labor activities for many years, confess at this late date that they do not know what constitutes peaceful picketing under the Wisconsin law (p. 52 of Brief). It is amusing to note the facility with which they define this term when they argue the rights of labor in other cases. The alleged "vague contours" of the term "picketing" as used in the Wisconsin Statutes and decisions did not confuse them in the least when they argued for those rights in the cases of *American Furniture Co. v. I. B. of T. C.* (1936), 222 Wis. 338, 268 N. W. 250; *Senn v. Tile Layers Protective Union* (1936), 222 Wis. 383, 268 N. W. 270, 268 N. W. 875; *Wis. Labor Relations Bd. v. Rueping Leather Co.* (1938), 228 Wis. 473, 279 N. W. 673. If further legal determination of what constitutes peaceful picketing in Wisconsin was needed, the Petitioners well knew they could be found in the decisions of this Court construing and applying Wisconsin labor legislation in the cases of *Senn v. Tile Layers Protective Union*, 301 U. S. 468, and *Lauf v. E. G. Shinner & Co., Inc.*, 303 U. S. 323. The Milwaukee Circuit Court had no difficulty in finding (R. 45):

> "All of the terms in the Employment Peace Act are sufficiently definite and have been judicially defined many times. * * * The Act is sufficiently definite and certain in terminology which may be said to include 'well-understood concepts of the law,' (*Wisconsin Labor Relations Bd. v. Rueping Leather Co.*, 228 Wis. 473, 495)."

The State Supreme Court by process of elimination definitely ruled out any general prohibition of peaceful picketing as described in the *Thornhill case* in the enforcement of *Sec. 111.06 (2), (c) Wis. Stats.* in the State of Wisconsin when it stated in its original opinion (S. R. 56):

> "The term 'picketing' as used in subsection (2) (c) of Sec. 111.06 Stats., 1939, does not include acts held in the *Thornhill case*, supra, to be within the protection of the Constitutional guaranty of the right of free speech. The express language of the Act forbids such a construction. It clearly refers to that kind of picketing which the *Thornhill case* says the State has the power to deal with 'as a part of its power to preserve the peace, and protect the privacy, the lives and the property of its residents.'"

This language was repeated almost verbatim in the final opinion of the Supreme Court denying the motion for rehearing (S. R. 70-71).

It is suggested by Petitioners in their Brief (pp. 31-33) that they were denied the right to picket peacefully in the case at bar because of the absence of an employer-employee relationship or a labor dispute as defined by *Section 111.02 (8) Wis. Stats.* (p. 19 of Brief). This is not the fact. There never was a question of "stranger picketing" in the case at bar. No claim was ever made that the Petitioners, their officers or members were denied the right to picket peacefully because of the absence of an employer-employee relationship, for all the parties involved and the State Courts recognized the right to picket peace-

fully or free speech was not dependent upon such relationship (*American Federation of Labor v. Swing*, 312 U. S. 321). *Sec. 111.02 (8) Wis. Stats.* defining a labor dispute as a controversy between an employer and the majority of his employees and *Sec. 103.62 (3) Wis. Stats.* having a similar definition were completely ignored by the parties and the State Courts in the case at bar because *Sec. 111.15 Wis. Stats.* expressly admonished the State Courts not to construe the Wisconsin Employment Peace Act so as to invade unlawfully the right of free speech. The only issue in this case prior to the calling of the strike was the right of the Union to a closed shop without first obtaining a three-fourths vote by secret ballot as required by *Sec. 111.06 (1) (c) Wis. Stats.* and the award of the Arbitration Board (Exhibit 9, R. 266). After the strike was called the only issue was the right of the State of Wisconsin in the exercise of her sovereign police powers over all manifestations of force and coercion within her borders to regulate *concerted* picketing and *concerted* boycotting by powerful labor combinations engaged in violence, coercion, intimidation, and other unfair labor practices, including the failure to obtain a majority vote of the workers by secret ballot before engaging in the above overt concomitants of a general strike (*Sec. 111.06 (2) (e) Wis. Stats.*). The Petitioners' constitutional attack was directed solely at this last mentioned statute and no other. The Wisconsin Supreme Court stated in its original judgment (S. R. 53):

> "While the briefs on both sides contain much matter relating to the history, background and philosophy of labor legislation, the *sole* contention made here is that subsec. (2) (e) 111.06 Stats. 1939 is unconstitutional and void * * *."

Again the State Court made the issue clear when it stated

in its second opinion after denying the motion for rehearing (S. R. 70-71):

> "We did not deal with every provision contained in the Employment Peace Act for the reason, as stated in the opinion, upon this appeal Sec. 111.06 (2) (c) Stats. 1939, was the only section of the statute drawn in question and it is with the construction of that section that we deal and it is explicitly so stated in the opinion."

In the face of this record, what justification is there for the attempt to interject at this late date a feigned issue concerning "stranger picketing"?

II.

The Order of the Board and the Enforcing Judgment of the State Courts Constitutionally Apply the Wisconsin Employment Peace Act to the Proven Facts in the Case.

A. The Record Shows Violent Means Were Adopted for Unlawful Purposes and Continued Fear and Intimidation Exist.

It is claimed by Petitioners that the Order of the Board confirmed by the judgment of the State Courts was not based upon such "extreme and flagrant violence", as existed in the *Meadowmoor case*, that fear and intimidation no longer exist in the case at bar because the Petitioners were granted a qualified stay of the Board's Order pending an appeal to the Wisconsin Supreme Court, and there has been no "continuing and recurring violence" (pp. 15-16, 38-49 Brief). Must the people of Wisconsin wait until there is such "extreme and flagrant violence" as existed in the *Meadowmoor case* — 53 windows broken, 8

trucks seized, 9 stores bombed and burned, 4 other assaults and destruction of property — before industrial peace can be restored and the employer, the working employees and the general public can be protected in their legal rights by the exercise of the State's police power? When this Court stated in the *Meadowmoor case* (312 U. S. 287, at 295) "The Fourteenth Amendment still leaves the State ample discretion in dealing with manifestations of force in the settlement of industrial conflicts" did it intend to limit those "manifestations of force" to only the "extreme and flagrant" types of violence as existed in the *Meadowmoor case?* If so, what is left of the State's "ample discretion" in Labor matters? Certainly force can manifest itself not only by physical violence, but also by other coercive activities that give rise to fear and intimidation, and destroy the free will of man. It is a matter of common knowledge that often "force" and "coercion" generated by means other than physical violence are extremely destructive, fearful and intimidatory — even more so than if physical violence had actually been used.

It suffices to say in the case at bar that the Wisconsin Labor Relations Board, the Milwaukee Circuit Court and the Wisconsin Supreme Court have determined the question of fact that a background of violence creating fear and intimidation existed and warranted the issuance of the Cease and Desist Order now under review. Thus, the Wisconsin Supreme Court stated (S. R. 58, 63):

> "In this case it is undisputed that numerous assaults were committed by pickets, that the pickets acted in concert; that the fines of these pickets were paid by the Unions; that ingress and egress to and from the premises of the employer were prevented by force and arms. * * * The acts committed by the petitioners as shown by the findings in this case

would have justified injunctive relief under the Common Law or any labor relations statute, either state or federal."

This Court can reject this determination of fact only if it can say, "It is so without warrant as to be a palpable evasion of the Constitutional guaranty here invoked." (*Meadowmoor case*, 312 U. S. 287, 294.)

The true record of the violent means adopted by the Petitioners — including physical violence, mass picketing, secondary boycott, crimes and misdemeanors — is shown in detail on pages 6 to 13 of the Plankinton House Company Brief in Opposition to the Petition for Writ of Certiorari, and for the sake of brevity is not repeated here, but a reading by the Court is invited. Likewise the continuity of the fear and intimidation generated by the Petitioners' past acts of violence and other unfair labor practices affecting particularly the working employees in the enjoyment of their legal rights to work, self-organization, collective bargaining and security in their person and property is fully covered on pages 16 to 18 of the last mentioned brief.

The real object of the Petitioners' unlawful concerted activities as shown by the record is also discussed fully at pages 13 to 16 of the same brief. The undisputed evidence disclosed the Petitioners were not satisfied with picketing peacefully as defined in the *Thornhill* and *Carlson cases*. They were not content with publicizing the true facts of a labor dispute, for if they were they would be forced to admit that they destroyed industrial peace in Milwaukee by cancelling negotiation proceedings, demanding arbitration and then rejecting the arbitrators' award, and later calling a strike for the purpose of forcing the employer to:

(1) Grant them a closed shop contrary to law, (Sec. 111.06 (1) (c) Wis. Stats.) and without taking any vote therefor (R. 226, 266).

(2) Bargain collectively with the representative of less than a majority of his employees contrary to law (Sec. 111.06 (1) (e) Wis. Stats.) when another had been duly certified by the Board as the exclusive representative of his employees and had a valid collective bargaining contract with the employer (S. R. 39, 40).

(3) Interfere with and coerce his employees in their legal rights including the right to self-organization and to join or not join a union, contrary to law (Sec. 111.06 (1) (a), Sec. 111.04 Wis. Stats.) so as to give the Petitioners exclusive collective bargaining rights.

The unions were not content with free competition and the true communication of thoughts in the open market of ideas. They were not satisfied with an appeal to reason in order to inform and persuade the public and the working employees to lend support to particular trade unions (Cf. *A. F. of L. v. Swing*, 312 U. S. 321). On the contrary, they sought to coerce by resorting to concerted acts of extreme violence and realistic picketing enmeshed with a destructive primary and secondary boycott resulting in continuing fear and intimidation of the suppliers of merchandise, working employees and the business customers of the Plankinton House Company. Under these circumstances the language of this Honorable Court in the *Meadowmoor case* (312 U. S. 287, at 294 and 295) is very pertinent in the case at bar, to-wit:

> "The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. So the

Supreme Court of Illinois found. We cannot say that such a finding so contradicted experience as to warrant our rejection. Nor can we say that it was written into the Fourteenth Amendment that a State through its Court cannot base protection against future coercion on an inference of the continuing threat of past misconduct.

"These acts of violence are neither episodic nor isolated. Judges need not be so innocent of the actualities of such an industrial conflict as this record discloses as to find in the Constitution a denial of the right of Illinois to conclude that the use of force on such a scale was not the conduct of a few irresponsible outsiders. The Fourteenth Amendment still leaves the State ample discretion in dealings with manifestations of force in the settlements of industrial conflicts."

The fact that the Milwaukee Circuit Court granted the Petitioners a qualified stay of its judgment and the Board's order pending an appeal to the Wisconsin Supreme Court as it believed the law (*Sec. 274.23 Wis. Stats.*) required as a matter of right rather than of discretion, does not alter the adjudicated fact — later authenticated by the Wisconsin Supreme Court — that *there was a background of violence generating fear and intimidation in the case at bar.* It was after the Wisconsin Supreme Court rendered its opinion in this case that it was definitely decided for the first time in Wisconsin that the issuance of a stay order pending an appeal was discretionary so far as the prohibitory, as distinguished from the mandatory, features thereof were concerned (*Carpenter Baking Company v. Bakery Sales and Drivers Local Union*, 237 Wis. 24, 297 N. W. 118). Consequently, there was no logical connection between the issuance of the qualified stay order by the Milwaukee Circuit Court and the claim by the Petitioners that no fear and intimidation

survived the past violence warranting the denial of the right to picket peacefully in the future.

B. The Record Shows the Unions Authorized, Participated in, and Ratified the Acts of Violence and Other Unfair Labor Practices.

A question is raised in the Petitioners' Brief (pp. 15, 50-51) with respect to the responsibility of the Unions for the unfair labor practices charged in the complaint, proved in the record and found by the Board and the Courts. It is elementary that the affirmance of an act by an agent may be established by any conduct of the purported principal manifesting that he consents to be a party to the transaction and that the affirmance of an unauthorized transaction may be inferred from a failure to repudiate it. (*Restatement of the Law on Agency,* Vol. 1, Sec. 92, 94, pp. 230-238.) *Sec. 103.54 Wis. Stats.* expressly provides that an officer or member of an association and the association participating or interested in a labor dispute may be held responsible or liable in any civil action at law or suit in equity or in any criminal prosecution for the unlawful acts of individual officers, members, or agents upon proof of a preponderance of the evidence of:

(1) The doing of such acts by persons who are officers, members, or agents of any such association, and

(2) Actual participation in or actual authorization of such acts or ratification of such acts after actual knowledge thereof by such association.

In the case at bar authorization and ratification after actual knowledge were proven by the testimony of the Union Officers themselves to-wit:

(1) Alfonso Gamby, testified that he was the President of Local 122 and Chairman of the Executive Committee; that John Alexander kept a daily record of the men who were placed on the picket line and was appointed captain of the strike committee by Phil L. Valley, business agent, with the Executive Board's approval; that when men were placed on the picket line they were given cards and later paid off for picket duty; James O'Brien who was found guilty of violence on the picket line was so paid for his violent picketing (R. 218).

(2) Phil L. Valley testified he was the Union business agent, had supervisory control over the Union officers in their territory and saw to it that they kept their territory "clean"; he was authorized by the Union's Executive Committee to call the strike and had full power to appoint captains to handle the pickets (R. 83); he called the strike (R. 84) and ordered 75 to 80 men to form a picket line about the entrances of the hotels (R. 85). He was present at the time the florist truck pulled up to make a delivery of floral decorations to the Plankinton House on November 4, 1939, when John Heisdorf (Union Vice-President) and Charles A. McLaughlin (Assistant Business Agent and Secretary of the Union) assaulted and battered the delivery man; he knew of the arrest of John Heisdorf and Charles McLaughlin therefor. The Unions provided bail and legal counsel; a day or two thereafter Mr. Heisdorf was returned to the picket line (R. 85-87). The Unions also provided bail and legal counsel and paid the criminal fine for Mr. McLaughlin upon his arrest and subsequent conviction. Immediately thereafter the Unions returned Mr. McLaughlin to the picket line. He was again arrested for extreme violence on November 17, 1939, and again his bail and legal counsel were provided by the Unions, and upon conviction, his fine paid by the

Unions (R. 87). Mr. Valley knew about Mr. James O'Brien, a former Union member and prize fighter, who was arrested for assault and battery on the picket lines at the Plankinton House on November 17, 1939 (R. 88). Mr. Valley knew about Thomas J. O'Mahar, a member of the Union doing picket duty, who was arrested and convicted on November 14, 1939, for striking and kicking Edward Knopf, a bellboy at the Plankinton House. The Union again provided bail and legal counsel for Mr. O'Mahar and paid his fine and returned him to the picket lines (R. 89). Joseph Hofich is known to Mr. Valley as a member of the Union and captain of the pickets at the Plankinton House. Mr. Hofich was arrested by the police on November 19, 1939, for striking Rudolph Stano, a bellboy, several blows in the face with his clenched fist; Mr. Valley received the report on this assault and battery and the Union provided bail and legal counsel for Mr. Hofich (R. 89, 90). Later Mr. Hofich was found guilty and fined for this offense (R. 196). Thereafter, Mr. Hofich was returned to the picket line as *supervisor of pickets* (R. 97).

(3) John Alexander testified that he was Chairman of the strike committee, had complete charge of all the pickets, instructed them how to behave, and appointed picket captains. He placed Charles A. McLaughlin and John Heisdorf on the picket line. He instructed Thomas O'Mahar and Larry McAllen how to act on the picket line. He appointed Joseph Hofich captain of the pickets. After checking the record of James O'Brien with the Union records and his performance in the picket line, he paid Mr. O'Brien for performing picket duty (R. 95-99, S. R. 19, 20). The record discloses that James O'Brien as a picket not only assaulted and battered Paul Ziebell, an employed bellboy, on November 7, 1939 (R. 132-138, S. R.

19, 20), but on November 5, 1939, threatened Lester Raasch, an employed bellboy, with physical violence (R. 135-138) and on November 6, 1939, spit upon Lester Raasch while he was holding the hotel doors open for guests (R. 136).

Thus, it will be observed that the parties found guilty of violence were not "irresponsible strangers" who forced their way into the picket line but were high ranking union officers, picket captains and members of the Union in good standing, still retaining their supervisory powers and high Union offices (R. 97). Some of them have been found guilty of not only one so-called isolated violation or fugitive encounter but several distinct criminal offenses and nevertheless returned to the picket line after bail, legal counsel and even criminal fines were provided by the Unions. In the face of that record, can anyone help but conclude that the Unions authorized and participated in the unlawful acts of their leading officers and members?

The untimely resolutions, if any, of the Union Executive Board (R. 218) later reprimanding the law violators are simply self-serving oral declarations — never reduced to writing for inspection and verification. Needless to say the effect of those so-called resolutions was never very stimulating but, in fact, was destroyed by the Unions' permitting the self-same lawbreakers to return to the picket line as supervisors and captains after their criminal convictions. The self-professed Union apostle of peace, John Alexander, despite his national experience in Union activities from New York to San Francisco, supervised the pickets in the conduct of a sitdown strike at the Milwaukee Athletic Club in 1937 (R. 227, 228, S. R. 35, 36). He was the former President and business manager of the C. I. O. Hotel Employees' Union which he admitted was controlled by Communists, "out of twelve members of the

Executive Board of the C. I. O., nine were members of the Communist Party and it was under Communists' domination" (R. 225, S. R. 35). It might well be said that the violent conduct of the Unions, their officers and members, speak more convincingly than their flimsy words of mouth. Neither the Court nor the injured third parties are bound by the Unions' mere declaration but may seek and find the true purpose of their concerted action (*Schultz v. Frankfort, etc., Ins. Co.*, 151 Wis. 537, 546, 139 N. W. 386).

As stated by this Court of a labor controversy in *American Steel Foundries v. Tri-City Central Trades Council, et al.* (1921), 257 U. S. 184, 42 Sup. Ct. 72, 66 L. Ed. 189:

> "When one or more assaults or disturbances ensue they characterize the whole campaign which became effective because of its intimidating character in spite of the admonitions given by the leaders to their followers as the lawful methods to be pursued, however sincere."

The observation of Mr. Justice Frankfurter in the recent case of *Milk Wagon Drivers Union, et al., v. Meadowmoor Dairies, Inc.*, 312 U. S. 287 at 295, is also very pertinent, to-wit:

> "It is true of a union as of an employer that it may be responsible for acts which it has not expressly authorized or which might not be attributable to it on strict application of the rules of respondeat superior."

The basis, therefore, for the issuance of the Labor Board's order was not merely the failure on the part of the Union to obtain a majority vote before going on strike (p. 7 of Brief) but also embraced the violence and unfair labor practices on the part of the Unions, their officers and their members who were sued in a representative capacity. The Findings of the Board numbered 15 to 27

(R. 256-259), together with the amended Finding numbered 26 (R. 271), refer to the action of the Unions and indicate that the individuals who were found guilty of unfair labor practices were stationed at the hotels by the Unions as paid pickets and committed the unlawful acts on the picket line *as officers and members of the Unions.* The Board's Conclusion of Law numbered 4 (R. 260) and amended Conclusion of Law numbered 4 (R. 271, 272) specifically find the above named parties and others guilty of unfair labor practices *"arising out of the controversy between respondent unions and the complainant, Plankinton House Company."* Also, the Order of the Board to cease and desist from attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employees of the Plankinton House Company is expressly directed against the *appellant Unions, their officers, members, agents, successors, and assigns* (R. 260, 261). As the Wisconsin Supreme Court tersely stated in its opinion when referring to the unlawful conduct of the Unions (S. R. 70):

> "The appellants could not be ordered to cease and desist from something they were not engaged in."

Where, therefore, is there any basis in the record for the Petitioners' claim (Brief p. 40) that "the respondent unions and their members were guilty of unfair labor practices only by virtue of the employees having gone out on strike without first obtaining the approval of the majority by secret ballot and by co-operating in strike activities without such approval"?

C. The Order of the Board Enforced by the Judgment of the State Courts Is Not Too Broad and Comprehensive.

The Petitioners' claim that the Board's order is more comprehensive than necessary under the facts and "in the

instant case we have an injunction which is a complete prohibition of *all* picketing and *all* boycotting which would include in its broad meaning all other means of communication wholly unrelated to the violence involved" (Brief 51-54). The Record is directly contrary to these claims. The concerted coercive conduct enjoined by the Board's order (R. 261) was:

> "(a) Engaging in promoting and inducing picketing at or near the Plankinton House or the Kilbourn Hotel;
>
> "(b) Attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employees of the Plankinton House;
>
> "(c) Boycotting in any way the Plankinton House."

Thus, it is seen the regulation of picketing is confined to *at or near* the Plankinton House or the Kilbourn Hotel. The order does not attempt to enjoin picketing at any other place except at the vicinity in which the campaign characterized by physical violence, mass picketing and other unfair labor practices creating fear and intimidation took place. Petitioners' claim that the boycotting provision of the order prohibits communication by letter, radio, newspaper or any other physical means of publicizing the true facts concerning a labor dispute is untenable, for the term "boycott" inherently involves intimidating and coercive factors not involved in the mere exercise of the constitutional right of free speech.

It is submitted that the Board's order is not broader than the injunction issued by the Illinois Supreme Court in the *Meadowmoor case* and confirmed by this Court when it stated (312 U. S. 287 at 298):

> "The injunction is confined to conduct near stores dealing in respondent's milk and it deals with this

narrow area precisely because the coercive conduct affected it. An injunction so adjusted to a particular situation is in accord with the settled practice of equity, sanctioned by such guardians of civil liberties as Mr. Justice Cardozo. * * * Such an injunction must be read in the context of its circumstances."

As and when the continuing fear and intimidation generated by the past violence and unfair labor practices of the Petitioners has ceased, not only familiar equity procedure accords them the opportunity for modifying or vacating the order of the Board and the enforcing judgments of the State Court, but express provisions of the Wisconsin Employment Peace Act assure the Petitioners this right to relief. Thus, *Sec. 111.07 (1) Wis. Stats.* provides:

"Any controversy concerning unfair labor practices may be submitted to the Board in the manner and with the effect provided in this chapter, *but nothing herein shall prevent* the pursuit of legal or equitable relief in courts of competent jurisdiction." (Italics ours.)

The Wisconsin Courts, therefore, were always open to give the Petitioners the appropriate equitable relief as and when they were entitled to it. There was no basis upon which the State Courts could reasonably anticipate that the fear and intimidation generated by the past violence and unlawful conduct would immediately cease upon the rendition of their judgment. On the contrary, the Trial Court found (R. 20-21):

"The Board was justified in concluding that the violent methods, assaults or disturbances which were pursued or which ensued from the outset and from time to time thereafter were ample to characterize the whole campaign or to warrant a reasonable inference that the attitude of the picketers was *continuously threatening or that threatening conduct*

would be resorted to should conditions be favorable for the purpose." (Italics ours.)

This prophetic foresight of the Milwaukee Circuit Court was fully justified by the subsequent events. The Petitioners made no application to modify or vacate the order of the Board or even indicate to the State Courts that in their opinion fear and intimidation no longer existed by reason of past violence and other unfair labor practices. Taking the law into their own hands and accepting the advice of their general counsel instead of the judicial mandates of the State Court the Petitioners continued in their unlawful conduct. As a result, they were found guilty of contempt of court in a proceeding brought by the Attorney General for the State of Wisconsin to prevent their continuing manifestation of force, fear, unfair advertising and realistic picketing enmeshed with illegal boycott and picketing en masse. The Findings of Fact and Conclusions of Law in the contempt proceedings are set forth on pages 1 to 29 of the "Appendix to Reply Brief" filed by Petitioners and made part of the Record of this case. This Court's attention is particularly called to Findings of Fact XII to XXXII and Conclusions of Law number 2 to number 4 inclusive, as evidence of the continuing contumacious conduct of the Petitioners herein.

The fact that the Petitioners have made no application to the State Courts to modify or vacate the order of the Board on the ground that the continuing fear and intimidation or coercive effect of their past violence has disappeared is alone sufficient to dispose of their present contention. In the *Meadowmoor case* (312 U. S. 287 at 299) this Court stated:

> "Since the Unions did not urge that the coercive effect had disappeared either before us or apparently before the State Court, that question is not now here."

CONCLUSION

It is submitted that the judgment of the Wisconsin Supreme Court should be affirmed because the record herein shows:

(1) *Sec. 111.06 (2) (e) Wis. Stats.* as construed by the Wisconsin Supreme Court evidences a careful balancing of public and private interests and is narrowly drawn and specifically aimed at serious encroachments upon those interests so as to be a valid exercise of the State's police powers without unlawfully invading the Constitutional Rights of Free Speech and Equal Protection of the Law guaranteed by the Fourteenth Amendment.

(2) The order of the Wisconsin Employment Relations Board being coextensive with the above statute as construed by the Wisconsin Supreme Court does not result in an unconstitutional application of the statute to the undisputed evidence of past violence and continuing fear and intimidation in the case at bar.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 124.—October Term, 1941.

Hotel & Restaurant Employee's International Alliance, Local No. 122, et al., Petitioners,
vs.
Wisconsin Employment Relations Board, et al.

On Writ of Certiorari to the Supreme Court of the State of Wisconsin.

[March 2, 1942.]

Mr. Justice Frankfurter delivered the opinion of the Court.

We brought this case here from the Supreme Court of Wisconsin, 314 U. S. —, to canvass the claim that Wisconsin has forbidden the petitioners to engage in peaceful picketing insofar as we have deemed it an exercise of the right of free speech protected by the Due Process Clause of the Fourteenth Amendment. *Thornhill* v. *Alabama*, 310 U. S. 88; *American Federation of Labor* v. *Swing*, 312 U. S. 321. The specific question for decision is the constitutional validity of an order made by the Wisconsin Employment Relations Board acting under the Employment Peace Act, Wisconsin Laws of 1939, c. 57. In deciding this question we are of course controlled by the construction placed by the Supreme Court of Wisconsin upon the order and the pertinent provisions of the Act.

These are the undisputed facts. In June 1938, the petitioners, various unions representing hotel and restaurant employees, made a closed shop agreement for a year with the respondent Plankinton House Company, which owned two hotels in Milwaukee. After negotiations between the parties for renewal of the contract failed, the dispute was submitted to arbitration. On October 30, 1939, the Company notified the unions of its willingness to sign a contract in accordance with the terms of the arbitration. Three days later the employees of both hotels went on strike. Members of the unions picketed the hotels, and the company continued to operate the hotels with new employees. Union pickets forcibly prevented the delivery of goods to one of the hotels. For this conduct two union officials were arrested and fined. One of them

returned to the picket line immediately after his arrest, assaulted one of the non-striking employees, and was again arrested and fined. Numerous other outbreaks of violence resulted in the conviction of the offending pickets and occasioned special police measures to maintain the peace.

The Company complained to the Employment Relations Board that the petitioners had committed "unfair labor practices". After due hearing the Board made findings of fact, not challenged throughout these proceedings. Upon the basis of these findings the Board issued the order set forth in the margin.[1]

In accordance with the statutory provisions for judicial review, the petitioners applied to the Circuit Court of Milwaukee County, Wisconsin, to set aside the Board's order. The Board cross-petitioned for enforcement. The Circuit Court sustained the order, and an appeal was taken to the Supreme Court of Wisconsin which affirmed the judgment and, after further elucidating the meaning of the statute and the order, denied a rehearing. 236 Wis. 329, 352.

The Wisconsin statute underlying this controversy was enacted as a comprehensive code governing the relations between employers and employees in the state. Only a few of its many provisions are relevant here. Section 111.06 provides that it shall be "an

[1] "It is ordered that the respondent unions, Hotel and Restaurant Employees International Allignce, Local No. 122, International Laundry Workers, Local No. 174, Bartenders International League of America, Local No. 64, International Union of Operating Engineers, Local No. 311, and the Milwaukee Building Trades Council, the officers, members, agents, successors and assigns of each shall:

"1. Immediately cease and desist from:

(a) Engaging in promoting or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;

(b) Attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of the Plankinton House Company;

(c) Boycotting in any way the Plankinton House Company.

"2. Take the following affirmative action, which the Board finds will effectuate the policies of the act:

(a) Post notices to their members in conspicuous places at the union headquarters that the union has ceased and desisted in the manner aforesaid, and that all officers, members and agents of the union are to refrain from engaging in promoting or inducing picketing and boycotting of the Plankinton House Company, and also to refrain from attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of the Plankinton House Company.

(b) Notify the Board in writing forthwith that steps have been taken by each of the respondent unions to comply herewith."

unfair labor practice" to "cooperate in engaging in, promoting or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employes of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike", and to "hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance." The Act contains a provision expressly dealing with its construction: "Except as specifically provided in this chapter, nothing therein shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work; nor shall anything in this chapter be so construed as to invade unlawfully the right to freedom of speech." § 111.15.

The central attack against the order is that, as enforced by the Wisconsin courts, it enjoins peaceful picketing. Whether Wisconsin has denied the petitioners any rights under the federal Constitution is our ultimate responsibility. But precisely what restraints Wisconsin has imposed upon the petitioners is for the Wisconsin Supreme Court to determine. In its opinion in this case, and more particularly in its explanatory opinion denying a rehearing, the Court construed the relevant provisions of the Employment Peace Act and confined the scope of the challenged order to the limits of the construction which it gave them. That Court has of course the final say concerning the meaning of a Wisconsin law and the scope of administrative orders made under it. *Aikens* v. *Wisconsin*, 195 U. S. 194; *Senn* v. *Tile Layers Union*, 301 U. S. 468. What is before us, therefore, is not the order as an isolated, self-contained writing but the order with the gloss of the Supreme Court of Wisconsin upon it. And that Court has unambiguously rejected the construction upon which the claim of the petitioners rests.

That the order forbids only violence, and that it permits peaceful picketing by these petitioners, is made abundantly clear by the expressions of the Court:

"The act does not limit the right of an employee to speak freely. . . . The term 'picketing', as used in [the act], does not

include acts held in the *Thornhill Case*, *supra*, to be within the protection of the constitutional guaranty of the right of free speech. The express language of the act forbids such a construction. It clearly refers to that kind of picketing which the *Thornhill Case* says the state has power to deal with 'as a part of its power to preserve the peace, and protect the privacy, the lives and the property of its residents'. . . . In this case it is undisputed that numerous assaults were committed by the pickets, that the pickets acted in concert; that the fines of these pickets were paid by the unions; that ingress and egress to and from the premises of the employer were prevented by force and arms. It was at conduct of that kind that the statute was aimed. It is conduct of that kind that is dealt with in this case. It is conduct of that kind that is declared to be an unfair labor practice by the statute and from which the defendants are ordered to cease and desist. . . . ." And on rehearing: "Under the statute and the order of the board as interpreted and construed by the explicit language of the [previous] opinion, freedom of speech and the right peacefully to picket is in no way interfered with. The appellants could not be ordered to cease and desist from something they were not engaged in. . . . The picketing carried on in this case was not peaceful and the right of free speech is in no way infringed by the statute or the order of the board." 236 Wis. 329, *passim*.

What public policy Wisconsin should adopt in furthering desirable industrial relations is for it to say so long as rights guaranteed by the Constitution are respected. *Aikens* v. *Wisconsin*, 195 U. S. 194; *Senn* v. *Tile Layers Union*, 301 U. S. 468. As the order and the appropriate provisions of the statute upon which it was based leave the petitioners' freedom of speech unimpaired, the judgment below must be affirmed. Problems that would arise had the order and the pertinent provisions of the Act been otherwise construed by the Supreme Court of Wisconsin need not therefore be considered.

Affirmed.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.